SUPREME COURT OF THE UNITED STATES.

No. ~~209~~. 202.

JOHN A. BAXTER and al., Claim'ts of the SHIP MARCELLUS, App'ts,

vs.

GEORGE LITTLEFIELD and MARY SAWYER, Ex'tx of SAMUEL B. SAWYER, Dec'd.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

GIDEON, Printer.

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UNITED STATES OF AMERICA,
Massachusetts District, *ss.*

AT a Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the District of Massachusetts, on Monday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and sixty:

Before the Honorable Nathan Clifford, Associate Justice.

In Admiralty.

GEORGE LITTLEFIELD and SAMUEL B. SAWYER, both of Wells, in the State of Maine, owners of the schooner "Empire,"
vs.
THE SHIP MARCELLUS, JOHN A. BAXTER and als., complainants.

United States of America, Massachusetts District, *ss.*

At a District Court of the United States, specially holden at Boston, within and for the District of Massachusetts, on Thursday, the tenth day of May, in the year of our Lord one thousand eight hundred and sixty:

Before the Honorable Peleg Sprague, Judge.

GEORGE LITTLEFIELD, et al., Libellants,
vs.
The Ship "MARCELLUS."

This libel was filed in court on the eleventh day of October, A. D. 1859, and is as follows, videlicet:

United States of America, District of Massachusetts, *ss.*

To the Honorable Peleg Sprague, Judge of the District Court of the United States, within and for the District of Massachusetts:

The libel and complaint of George Littlefield and Samuel B. Sawyer, both of Wells, in the State of Maine, owners of the schooner "Empire," of said Wells, of about one hundred and thirty tons burden, whereof Uriah M. Hutchins late was Master, against the ship Marcellus, of Boston, in said district, whereof ——— Hallett now is or late was Master, her tackle, apparel and furniture, and all persons lawfully intervening for their interest in the same in a cause of collision, civil and maritime, alleges and articulately propounds as follows:—

First. That your libellants before and at the time of the collision hereinafter mentioned, were the owners of the said schooner "Empire."

Second. That on the twenty-seventh day of September last, the said schooner, with a cargo consisting of 176 boxes and 40 hogsheads of sugar, of the value of ten thousand dollars, on board, left her wharf in Boston and proceeded on her voyage to Bristol, in the State of Rhode Island. That said cargo of sugar had been shipped on board for Messrs. Camp, Brunsen & Sherry, to be delivered at Bristol aforesaid, and the Master had signed the usual bills of lading so to deliver the same at said Bristol.

Third. That at about seven o'clock P. M., of said twenty-seventh day of September, the said schooner then being on her said voyage from Boston to Bristol, and with said sugar on board, was sailing out of the harbor of said Boston; that while she was so sailing the said ship "Marcellus," which was then sailing into said harbor of Boston, carelessly and negligently ran afoul of said schooner with great violence, striking her on her larboard side, and near or a little by aft of midship, and greatly injured and damaged said schooner thereby, and caused her to sink, so that said schooner, with all her tackle, apparel, furniture and stores, together with said sugar, were thereby totally destroyed and lost.

Fourth. That at the time the said schooner was so run into by said ship the said schooner was running through the narrows between Gollup and Lovell's Islands. That said schooner was then staunch, tight, and strong, and in every respect well manned and appointed, and had the usual and necessary complement of men on board. That all hands were on deck and on the alert, and the mate at the wheel. That at about 7 o'clock P. M., they saw a large sail coming towards said schooner, which proved to be the said ship "Marcellus." That at the time the said schooner was close hauled on the wind, or her starboard tack, and with all the sail she could make draw, that said schooner was on the windward side of the channel steering southeast by south, and the wind was southwest by south, and was working up to the windward to give the ship all the room possible. That the said ship was sailing into said port of Boston at great speed and had the wind free, and was able to pass said schooner without difficulty. That there were two-thirds of said channel to the leeward of said schooner. That as said ship approached said schooner the persons on board said schooner hailed her to keep off; a reply came from the ship to luff on board the schooner, but this was impossible, as the schooner was close up to the wind. That the schooner did not alter her course, and ought not to have done so under the circumstances. That the ship, immediately after this, hailed to the schooner to luff; luffed and instantly run into and upon the schooner, striking her near amidships, taking both masts and cutting her down. That the ship and schooner both having lost headway, and the ship being still afoul of the schooner, they drifted together to the leeward shore. That said ship procured assistance of a steamtug then present, which got her off from the wreck of the schooner and took her away. That the

schooner filled rapidly, and in about ten minutes after the collision sunk with her tackle, apparel, furniture, and said sugar was totally destroyed and lost.

Fifth. That the officers and crew of said schooner were, before and after the time of such collision, using all care and diligence in the management of said schooner, and used all due and proper care and caution to avoid said collision, and that after said collision they used all efforts in their power to save said schooner and cargo from sinking and destruction.

Sixth. That the said collision and loss were caused wholly by the culpable carelessness and negligence of those on board and managing the said ship, and would not have occurred if due caution and proper diligence had been used by them, and in no way by a want of care and diligence on the part of those on board of the schooner.

Seventh. That said schooner was so injured and disabled by the force and violence with which she was struck that she very shortly sunk in spite of the efforts of her crew, and with her apparel, furniture, stores, and sugars on board was totally destroyed and lost, to the damage of said libellants the sum of fifteen thousand dollars.

Eighth. That said ship "Marcellus" is now lying in Boston aforesaid, within this District, and within the jurisdiction of this honorable court.

Ninth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore the libellants pray that process in due form of law according to the course of this honorable court in causes of admiralty and maritime jurisdiction may issue against the said ship, her tackle, apparel, and furniture; and that all persons having any interest therein may be cited to appear and answer all and singular the matters aforesaid; and that this honorable court would be pleased to decree the payment of the damages as aforesaid with costs, and that the said ship may be condemned and sold to pay the same, and that the libellants may have such other and further relief as in law and justice they may be entitled to receive.

GEORGE LITTLEFIELD.

SAMUEL B. SAWYER,
By GEORGE LITTLEFIELD, Agent.

C. T. & T. H. RUSSELL,
Proctors for Libellants.

Sworn to before me. S. E. SPRAGUE, Clerk.
October 11th, 1859.

Warrant and Monition.

Thereupon, to wit, on the eleventh day of October, A. D. 1859, by order of the judge, a warrant and monition issued commanding the marshal to give notice to all persons concerned that the fore-

going libel has been filed, and that trial would be had thereon at a special District Court to be holden at the said United States Court-house in Boston, in said District of Massachusetts, on Friday, the 21st day of October, instant, at ten o'clock A. M., by posting a copy of the same notice at the said court-house in Boston, seven days at least before said day of trial, and to take the said ship, her tackle, apparel, and furniture into his custody, and to make due return of his doings.

And the marshal made return thereon as follows, videlicet:—

United States of America, Massachusetts District, *ss.*

October 11th, 1859.

Pursuant hereunto I have given notice to all persons concerned, that the libel within named has been filed, and that trial would be had thereon by posting the substance of the within monition in the United States Court-house in said Boston seven days at least before the day within named for trial, and on the 11th day of said October, I took the ship "Marcellus," her tackle, apparel, and furniture, into my custody on this warrant.

WATSON FREEMAN, U. S. Marshal.

Stipulation for Costs and Expenses.

Then, on the twelfth day of October, A. D. 1859, personally appeared John A. Baxter, of Boston, in the District of Massachusetts, agent and part owner of said ship "Marcellus," and the claimant thereof, and produced for sureties William Dillaway, Charles H. Dillaway, and Joseph H. Adams, all of said Boston. And the said John A., William, Charles H. and Joseph H. submitting themselves to the jurisdiction of this court, bound themselves, their heirs, executors, and administrators, jointly and severally, in the sum of two hundred dollars unto the said libellants, that the said John A. should pay all costs and expenses which should be awarded against them in this suit, upon the final adjudication thereof, or by any interlocutory order, whether it be in this or any appellate court.

Claim.

Oct. 12th, 1859. Filed in court.

United States of America, District of Massachusetts, *ss.*

GEORGE LITTLEFIELD et al.
vs.
SHIP "MARCELLUS."

And now, John A. Baxter, agent and part owner of said ship "Marcellus," comes and claims said ship in behalf of and as the authorized agent of the owners of said ship, and says that said

ship is owned by the following parties, to wit: William Dillaway and John A. Baxter, of Boston, Josiah Gorham, Alexander Baxter, Sylvester Baker, Jr., James B. Crocker, and John Gorham, of Yarmouth; Sylvester Baxter, Asa Lothrop, Owen Bearse, Robert B. Hallett, and Thacher Hinckley, of Barnstable, in said District; that they are the sole, true, and bona fide owners of said ship "Marcellus," and that no other party is owner therein. And that he, the said John A. Baxter, is the agent of said owners duly authorized in this behalf, and therefore prays that said ship may be delivered to him upon giving proper stipulations therefor in the premises.

JOHN A. BAXTER.

B. R. CURTIS,
H. A. SCUDDER,
Proctors for Respondents.

Circuit Court United States, Massachusetts District.

October 11th, 1859.

Sworn to before me.

H. W. FULLER, Clerk.

Stipulation to the Action.

On the twelfth day of October, A. D. 1859, again personally appeared John A. Baxter, the agent and part owner and claimant of the ship "Marcellus" as aforesaid, and produced for sureties, William Dillaway, Charles H. Dillaway and Joseph H. Adams, all of said Boston. And the said John A. Williams, Charles H. and Joseph H., submitting themselves to the jurisdiction of this court, bound themselves, their heirs, executors, and administrators, jointly and severally, in the sum of fifteen thousand dollars, unto the said libellants, that the said John A. should abide by all orders and decrees, interlocutory or final, of the court, and should pay the amount of final decree of the court, and all sums of money that he should be ordered to pay by the final decree of the court, whether it be in this or any appellate court.

Thereupon by order of the judge, a warrant issued directing the Marshal to cause said ship "Marcellus" and appurtenances to be delivered to John A. Baxter, he having stipulated therefor, as ordered.

On which the Marshal made return as follows, viz:—

United States of America, Massachusetts District, *ss.*

Boston, October 12th, 1859.

Pursuant to the within precept, I have caused the within named ship "Marcellus" and appurtenances to be delivered to the claimant within named, and have taken his receipt for the same, as underwritten. F. WARREN, Dep'y Marshal.

Boston, October 12th, 1859.

Received from Watson Freeman, Marshal in and for the District of Massachusetts, the within named Ship "Marcellus," and appurtenances in the same State, as when seized and detained by his deputy. JOHN A. BAXTER.

Answer.

January 30th, 1860. Filed in Court.

United States of America, District of Massachusetts, *ss.*

To the Honorable Peleg Sprague, Judge of the District Court of the United States, within and for the District of Massachusetts.

And now John A. Baxter, William Dillaway, Charles H. Dillaway, of Boston, Josiah Gorham, Alexander Baxter, Sylvester Baker, Jr., James B. Crocker, John Gorham, of Yarmouth, Sylvester Baxter, Asa Lothrop, Owen Bearse, Robert B. Hallett, and Thacher Hinckley, of Barnstable, all in said district, intervening for their interest in the ship "Marcellus," appear before this honorable court, and for answer to the libel and complaint of George Littlefield and Samuel B. Sawyer, against said ship "Marcellus," her tackle, apparel and furniture, and against all persons lawfully intervening for their interest in the same, allege and articulately propound as follows:—

First. As to the allegations contained in the first article in said libel, the respondents say that they are ignorant thereof, and can neither admit nor deny, but require the libellants to prove the same.

Second. As to the allegations contained in the second article in said libel, and the article "A" thereto annexed, the respondents also say that they are ignorant thereof, and can neither admit nor deny, but require proof of the same.

Third. As to the allegations contained in the third article of said libel, the respondents admit that there was a collision between said schooner "Empire" and said ship "Marcellus," and that said schooner was damaged thereby so that she sunk, also that said ship came in contact with said schooner on her larboard side, but as to the particular point of contact between said vessels, the respondents are ignorant and require proof thereof. And the respondents deny that said ship "Marcellus" carelessly and negligently ran afoul of said schooner, or that any negligence, or carelessness, or fault existed on the part of said ship in the matter of the collision referred to. And the respondents, upon their information and belief, further deny that said schooner, with all her tackle, apparel, furniture, and stores, together with the sugar on board, were thereby totally destroyed and lost, as alleged.

Fourth. As to the allegations contained in the fourth article in said libel the respondents admit that at the time of said collision said schooner was running through the narrows between Gallup's

and Lovell's Islands; but as to all other matters alleged and contained in said article, the respondents deny the same except so far as they are hereinafter expressly admitted.

Fifth. As to the fifth article in said libel, the respondents deny the matters therein alleged.

Sixth. As to the matters alleged in the sixth article in said libel, the respondents also deny the same.

Seventh. The respondents say that they are personally ignorant of the matters alleged in the seventh article in said libel, and require due proof thereof.

Eighth. The respondents admit the allegations contained in the eighth article in said libel.

Ninth. The respondents deny the allegations contained in the ninth article of said libel.

Tenth. And the respondents further answering say, that on the afternoon of the day on which said collision is alleged to have occurred, said ship "Marcellus" being in good order, and well rigged, furnished, apparelled, and equipped, with a full and competent crew, and an experienced and proper pilot on board, was coming up Boston Harbor, with all sails set except her studding sails, and the lee clew of her mainsail, which was hauled up to enable her pilot to see well. That the wind was southwest, and the ship upon her larboard tack, running free with her yards braced sharp. That between the hours of six and seven of the afternoon aforesaid, said ship was passing through the narrows between Gallup's and Lovell's Islands, along the leeward edge of the channel between said Islands, and hugging the leeward shore as close as it was possible for her to do with safety. That, while she was so passing, said schooner was discovered some distance ahead coming down said harbor, with a free wind, and at first appeared to be going to the windward of said ship, as she should and easily might have done with proper management and care, but that said schooner afterwards changed her course and ran down as if going to the leeward of said ship, and when she had approached within a short distance of said ship, luffed across her bows. That sad ship endeavored by keeping off all in her power, to go clear of said schooner, but could not, and thus said ship, without any fault or negligence on her part, and in spite of every endeavor and precaution used by those in charge of her, came in contact with said schooner, and a violent collision ensued, which resulted in the mutual damage of both vessels, and in the sinking of said schooner a short time after.

Eleventh. And the said respondents further say, that said collision occurred upon the leeward side of said channel, between said islands, and within a few feet of the shore of the leeward island, and that all possible measures and precautions were taken on the part of said ship by hailing and keeping her off and otherwise, to avoid said collision. That said ship did not luff as alleged by the libellants, but endeavored to keep off all she could. That said

schooner might easily have avoided said ship with proper care and effort, and ought so to have done: that said schooner was carelessly, negligently, and unskilfully managed and navigated. That said collision occurred entirely through the negligence and fault of said schooner and those in charge of her, and not through any fault, carelessness, or negligence of said ship, or of those in charge of her: that said ship was carefully, skilfully, and in all respects properly navigated, but, under the circumstances, and on account of the fault, negligence, carelessness, and unskilfulness on the part of said schooner, and those in charge of her, it was impossible for said ship to go clear of said schooner, or to avoid said collision; and that said ship is in no way responsible or liable for the consequences of said collision.

Twelfth. That by reason of said collision, and through the fault and negligence of said schooner and those in charge of her, in the way and manner hereinbefore stated, said ship "Marcellus" was greatly damaged in her hull, spars, rigging, and otherwise, to the amount of about one thousand dollars, for which the libellants are responsible, and which the respondents pray that they may be allowed and decreed in this cause.

Thirteenth. That all and singular the premises are true, in verification whereof, if denied, the respondents crave leave to refer to the depositions and other proofs to be by them exhibited in this cause. Wherefore the respondents pray this honorable court that it would be pleased to pronounce against the libel aforesaid, and for the damages claimed by the respondents aforesaid, and to condemn the libellants in costs, and otherwise right and justice to administer in the premises.

JOHN A. BAXTER,
For Owners and Claimants of ship "Marcellus."

B. R. CURTIS,
H. A. SCUDDER,
Proctors for Respondents.

Cir. Court United States, Mass. Dist.

Oct. 31, 1859.

Sworn to by said Baxter, before me,

H. W. FULLER, Cl'k.

[Here certain evidence is inserted, and the record then proceeds as follows:—]

This libel was entered at a special District Court held on the eleventh day of October, A. D. 1859, and thence was continued from time to time to this tenth day of May, A. D. 1860; and now, after a full hearing of the cause, upon the facts proved, and arguments of counsel, and mature deliberation thereon had, it is ordered, adjudged, and decreed, that said libellants recover against

the said ship "Marcellus," her tackle, apparel, and furniture, the sum of twenty-five hundred dollars, damages, and costs of suit, taxed at

And it is further ordered, by consent of parties, that said amount of damages is to be revised hereafter by an assessor in Boston, in case any court to which the case shall be carried by appeal shall affirm said decree of this court in favor of the libellants.

And on the said 10th day of May, A. D. 1860, the following prayer for an appeal was filed in court, viz:—

U. S. Dist. Court, Mass. District.

LITTLEFIELD and al.
vs.
SHIP "MARCELLUS."

And now the claimant of said ship appeal from the decree of this honorable court, and pray that their appeal may be allowed.

H. A. SCUDDER,
Proctor for Claimant.

Whereupon their appeal was allowed by the court.

United States of America, Massachusetts District, *ss.*

I, S. E. Sprague, Clerk of the District Court of the United States, within and for the said District of Massachusetts, hereby certify, that the foregoing is a transcript of the record of the said court in the said cause, made up pursuant to rules of said court in regard to appeals.

In witness whereof I have hereunto subscribed my name and affixed the seal of the said court, this twenty-first day of May, A. D. 1860.

[SEAL.] Attest: S. E. SPRAGUE, Clerk.

This appeal was entered in this Circuit Court at the May Term thereof, A. D. 1860, and the foregoing transcript of the record of the District Court was duly filed, when the appellants then and there appeared by H. A. Scudder, their proctor, and the libellants by Charles T. Russell and Thomas H. Russell, their proctors; and by leave of court, to wit, June 2d, 1860, the following amendment of the answer was filed and allowed, viz:—

And now the claimants and respondents in the above named cause come and ask leave to amend their answer therein by adding the following, to wit: "That, at the time of the collision referred to by the libellants, said ship Marcellus was under the entire management and control of a legally authorized pilot, who offered his services in the customary manner, and by law had a right to take charge of said ship, in respect to the employment of whom the Master of said ship had no choice or power of selection, and who was alone liable for any damages arising from any fault in the naviga-

tion and management of said ship. That, if said collision occurred through any fault on the part of said ship, said pilot was, and is, alone responsible therefor. By H. A. SCUDDER,
Proctor for Respondents."

The cause was then set down for hearing, and was fully heard. The same was thence continued to this present term, when the following petition is filed, to wit:

And now comes Mary Sawyer, of Wells, in the State of Maine, widow, and respectfully represents to this honorable court that Samuel B. Sawyer, one of the libellants in this case, has deceased during the pending thereof, and that she is his widow, and the duly appointed executrix of his last will and testament, which has been duly probated and allowed. Wherefore, she prays that she may be allowed to appear as such executrix, and to prosecute this cause as to the interest of the late Samuel B. Sawyer, and all which interest is now held by her as such executrix.

MARY SAWYER, Executrix as aforesaid.
By her Proctors, C. T. & T. H. RUSSELL.

And thereupon, it is ordered by the court that the prayer of the said Mary Sawyer be granted, and that she, the said Mary Sawyer, as executrix of the last will and testament of Samuel B. Sawyer, one of the libellants deceased, be and she is hereby allowed to prosecute this cause so far as the interest of said Samuel B. Sawyer is concerned, and to intervene for her interest therein, and she thereupon appears and prosecutes this suit.

And now the following decrees are entered:—

This cause came on to be heard at the last term of this court, and was argued by counsel, and was thence continued to this present term. And now, after a further hearing therein and mature deliberation thereon had, it is ordered, adjudged and decreed by the court here, that the decree of the District Court in this cause be, and the same is hereby affirmed, with costs; and, by consent of parties, it is further ordered that this cause be, and the same is hereby referred to Charles P. Curtis, Jr., as assessor, to hear the parties, examine their proofs, and report to this court as soon as may be, the amount of damages sustained by the libellants by reason of the wrongs complained of, and that the further orders of the court be reserved until the coming in of said assessor's report.

And now, on the coming in of said assessor's report, to wit, Nov. 14, whereby it appears "that the amount of damage sustained by the libellants at the time of the collision was two thousand four hundred dollars ($2,400), and the said assessor has added thereto the sum of one hundred and sixty-five dollars and fifty cents ($165 50), being an amount equal to the interest on said sum from that time to the present, and that the whole damage so by him assessed amounts to the sum of two thousand five hundred and sixty-five dollars and fifty cents ($2,565 50): It is thereupon here ordered,

adjudged and decreed by the court, that the said report be accepted, and that said George Littlefield and Mary Sawyer, executrix of the last will and testament of Samuel B. Sawyer, one of the libellants deceased, do recover against the said ship Marcellus, her tackle, apparel and furniture the said sum of two thousand five hundred sixty-five dollars and fifty cents (2,565 50), as and for their damage, together with their costs of suit taxed at

And thereupon in open court the said claimants file the following claim of appeal:—

And now the above named claimants and respondents in the above named cause, conceiving themselves aggrieved by the final decree entered on the fourteenth day of November, 1860, in the above entitled cause, do hereby appeal therefrom to the Supreme Court of the United States next to be holden at Washington, on the first Monday of December, 1860, and they pray that this their appeal may be allowed. H. A. SCUDDER,

Proctor for Claimants and Respondents.

Which appeal is allowed by the court. And said claimants give good and sufficient security to prosecute their said appeal with effect, and to pay all damages and costs if they shall fail to make their appeal good; which security is approved by the court.

And the parties file in court therewith, the following agreement, namely:—

"Whereas an appeal by the claimants has been taken in the above entitled cause to the Supreme Court of the United States, now it is agreed by the parties that this suit in the Appellate Court, shall abide the decision of that court in the case of Hugh N. Camp & als., libellants, against said ship, wherein an appeal has also been taken.

It is further agreed, that no evidence in this cause need be recorded or sent to the said Supreme Court, but that the facts as found by said court in the case of said Camp & als. shall be deemed and taken as applicable to this case; the admissibility of any evidence offered in said case of Camp & als. not to be affected by this agreement. C. T. & T. H. RUSSELL,

Proctors for Libellants, Appellees.

H. A. SCUDDER,

Proctor for Respondents, Appellants.

United States of America, Massachusetts District, *ss.*

I, Henry W. Fuller, Clerk of the Circuit Court of the United States for the First Circuit, Massachusetts District, do hereby certify that the foregoing is a true copy of the record and of all proceedings in the cause of George Littlefield and Samuel B. Sawyer *vs.* Ship Marcellus, in this court determined. (Evidence excepted as agreed by parties.)

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at Boston, in said district, this nine-

teenth day of December, in the year of our Lord one thousand eight hundred and sixty, and of the independence of the United States the eighty-fifth.

[SEAL.] H. W. FULLER, Clerk.

Endorsed: Massachusetts C. C. U. S. No. 289. John A. Baxter & al., Claim'ts of the ship Marcellus, App'ts, *vs.* George Littlefield & Mary Sawyer, Ext'x of Samuel B. Sawyer, dec'd. Filed 22d December, 1860.

1147

Supreme Court of the United States.

JOHN A. BAXTER & AL.

. Claimants of the Ship Marcellus, Appellants,

vs.

HUGH N. CAMP & AL. APPELLEE

BRIEF OF THE COUNSEL FOR THE APPELLANTS.

This case arises out of a collision which occurred at the entrance of the harbor of Boston on the 27th of September, 1859, between the schooner Empire and the ship Marcellus.

The evidence is voluminous, and, as usual in collision cases, conflicting.

But, tested by the settled rules of law, there is only one main question of fact to be decided, and the decisive evidence, *upon that question*, is not voluminous.

What that single question is must depend on the pleadings.

The libel states that the schooner, outward bound, was passing through "the Narrows;" that the ship, inward bound, had sea-room to pass the schooner to leeward; that the schooner kept her course; *that the ship luffed* and so struck the schooner.

The answer denies that the schooner kept her course, and it denies that the ship luffed.

Upon the pleadings, the parties are directly at issue upon the question whether the collision was caused by the luffing of the ship, while the schooner kept her course, or by the luffing of the schooner, while the ship substantially kept her course.

No fault is attributed by the libel to the ship, except that she luffed; and, the appellees themselves maintain that if neither vessel had changed its course there would have been no collision.

The only case propounded in the libel, is, that the schooner going through the Narrows on the starboard tack, and being *to windward* of the ship, the ship wrongfully luffed, and thereby caused the collision. And the only question in the case, under the rules of law, is, whether the ship caused the collision by luffing.

This is their case, or they have no case upon these pleadings.

It will be useful to begin its examination by stating some material facts upon which there is no controversy.

The libel alleges that the course of the schooner was "*south-east by south.*" Of course the appellees are bound by this most material allegation.

McKinley *vs.* Morish, 21 How. 343.
The Hoppet, 7 Cranch. 389.
Jenckes *vs.* Lewis. Ware's R. 51.

And if they were not, the Master of the schooner swears (pp. 69, Ans. 7,) that his course was south-east by south. The pilot of the ship swears (pg. 93, Ans. 28, 29,) that the course of the ship was *north-west by north.* It appears that he was duly commissioned under the pilotage system of the State, for the harbor of Boston; that he had ample experience and skill as a pilot; it was his professional duty to know the exact course of the ship in that narrow channel through which he was navigating her; he swears to the course; and there is no witness in the case, and no fact in the case which tends to contradict him.

It thus apears that the schooner and the ship before any change

of course by either of them, were approaching each other in *exactly opposite courses;* the schooner sailing south-east by south, the ship sailing north-west by north.

Another fact, which does not admit of controversy is, that when the vessels came together, the stem of the ship struck the larboard and lee side of the schooner, about midships, *at a large angle.*

Two things are manifest:

1. That between two vessels which approached each other, sailing on opposite courses, *such a collision* could not have occurred, unless one or both changed their courses.

2. That such a collision might occur by a change of course of either of the vessels.

Thus, if the two vessels were on opposite courses and the *schooner to windward of the ship,* and the ship should luff strongly and come up to the wind, while the schooner kept her course, the ship might strike the schooner on her lee side, at a large angle. So, if the schooner was *somewhat to the leeward of the ship,* and the schooner should luff strongly and come up to the wind and thus cross the track of the ship, the ship might strike the schooner on her lee side, at a large angle.

One other thing is also manifest. As this collision could have occurred *only by luffing* one or the other vessel; if the collision was produced by luffing the ship across the track of the schooner, the ship, when she began to luff, *must have been to the leeward of the schooner;* for, if before she began to luff, she was as far, or further, to windward than the schooner, and sailing on opposite course, it would have been impossible for the ship to have hit the schooner on her lee side, or to have hit her at all; the ship must have gone clear to windward of the schooner.

On the other hand, if the schooner was to leeward of the ship, though the ship *could* not cross the track of the schooner by luffing, the schooner *must* cross the track of the ship by luf-

fing, and whether the schooner would so cross the ship's track as to cause a collision, would depend upon the relative position of the two vessels when the schooner began to luff. If the schooner began to luff across the track of the ship, not early enough to get entirely across before the ship arrived at the point of crossing, and the ship kept her course, there must be a collision.

The question — and, it seems to me, the most material question in this case — is this: the ship and the schooner were approaching each other on opposite courses; did the ship, *being to leeward of the track of the schooner*, luff so as to cross the schooner's track, and thus produce the collision? or did the schooner, being to leeward of the ship, luff so as to cross the track of the ship, and thus produce the collision?

The libellants assert the first of these alternatives; the respondents deny it. Have the libellants proved it to the satisfaction of the Court?

To appreciate the evidence in this case it is necessary to attend to some important surrounding circumstances.

1. The ship Marcellus was coming up through "The Narrows," steering a course north-west by north, having the wind about south-west, which is a beam wind.

The schooner was bound out, was on the opposite course, (S. E. by S.,) had the wind just as free as the ship, and, being a fore-and-aft rig, could lie one point and a half nearer the wind than the ship.

2. A steamer, called the Rescue, coming into the harbor of Boston, entered "the Narrows" abreast of and to the windward of the ship, (on her left side,) shot ahead of the ship in "the Narrows," and at the same time inclined to the leeward, (the right,) so that when fairly ahead of the ship, the ship was directly astern of the steamer, and following in her wake.

All agree in this.

Hutchins, the master of the schooner, saw the ship so exactly in the wake of the steamer that he thought the steamer was towing the ship. (p. 69, ags. 7.)

The people on board the steamer testify to it explicitly.

Bond (p. 123, Ans. 5,) *Humphreys*, (p. 118, Ans. 10, 11, 12.) *Cummiskey* (p. 126, Ans. 3.)

And there is nothing to oppose it.

3. A schooner, called the "Pequannock," was about two lengths astern of the ship, following nearly in her wake, but a little further (about 15 feet further,) to windward.

Burroughs, the Master of the Pequannock, (p. 145).
Jackaway, the Mate, (p. 140).
Thompson, a boatman, who was on board the Pequannock, (p. 105).

These witnesses were mere spectators, having no interest in, or connection with the collision.

Now the case of the libellants is, that the schooner was to windward of the ship, and that the ship luffed up to windward so as to reach the track of the schooner, which would otherwise have gone clear.

If so, the schooner must have been to windward of the steamer, directly in whose wake the ship was.

Yet it is proved by the people on board the steamer that the schooner was so far to leeward that the steamer had to bear away, (to the right,) suddenly, three points, to get out of her way, and then only cleared her by a few feet.

Cummiskey, the Master, (p. 126–7, Ans. 10–14).
Bond, the steersman, (p. 123–4, Ans. 10–15).
Humphreys, (p. 119, Ans. 17).

The schooner must have been quite as far to leeward as the steamer was, when dead ahead of the ship. The testimony of the Master of the schooner that he thought the steamer was

towing the ship, also tends strongly to prove this; for if the schooner had been to windward he would have seen that the distance was too great for a tow.

And if the schooner was to the windward of the ship, and the ship luffed up to the course of the schooner, it is obvious the ship *must have also luffed across the track of the Pequannock*, which was just astern of the ship. Yet, the Pequannock's Master and Mate both swear the ship did not luff. (p. 146, Ans. 13, 14, p. 140, Ans. 10–14.) And so does Thompson, who was casually on board the Pequannock (p. 105, Ans. 6–11); and if the ship had luffed there would have been a collision with the Pequannock, as well as with the Empire.

The libellants place reliance on the statement of Jackaway, the Mate of the Pequannock, (p. 142, Ans. 15 x 16 x 17 x) that his vessel was sheered some to avoid the ship after the collision, and *that he does not think* (for he does not speak positively) they should have avoided the ship if they had not sheered. But this witness had previously stated that his vessel was only "a shade" to windward of the ship, (the Master says p. 145, Ans. 11, about 15 to 20 feet) and if the schooner was lying across the ships bows, it would seem to be necessary to sheer the Pequannock some, to avoid collision; and in addition to this Jackaway explains, (p. 114, Ans. 2–4) that he meant to express an opinion that if they had not sheered at all they would have hit the *yards* of the ship, which projected thirty feet; and it is probable that they would have done so, assuming that the ship kept her course and did not luff.

It is true the libellants' witnesses who were on board the schooner all swear that after rounding Nix's Mate, a shoal in the harbor, the schooner was put flat on the wind, and was so kept till the collision, and was to windward of the ship, and the ship luffed up to their track and struck the schooner.

If it were proved that after passing Nix's Mate the schooner was put on the wind, still, *whether she was kept there, or allowed to yaw and sag to leeward*, would depend upon the competency and attention of her helmsman. One great difficulty with the

witnesses of the libellant is, that in attempting to prove not only that the schooner was *put* close on the wind, after passing Nix's Mate, *but that she was kept there,* is that they swear to a great deal too much; for they one and all, including the boatman, Quinn, say the schooner did not change her course *at all, before the collision.*

Yet, it is clearly proved, that before the collision, and before the ship had changed its N. W. by N. course, the schooner was standing across the bows of the ship, and could not *then* have been sailing S. E. by S., which the libel says, and the master swears, was the course of the schooner from Nix's Mate downwards; and one of the witnesses, Mye, himself, says (p. 39, ans. 15,) that after passing the steamer, and before the ship had changed her course, *the schooner was heading across the ship's bow;* and another, Pells (p. 37, ans. 18,) says, when within 400 yards, they were *heading up to the weather of the ship,* and Quinn, the boatman, says (p. 67, ans. 19 x) that, at the time of the collision, the schooner was heading "for the south shore—Gallup's Island." How could they be heading across the ship's bows, or, what is the same thing, heading up to the weather of the ship, and to the south shore, before the ship had changed its N. W. by N. course, if the schooner had not changed her S. E. by S. course?

The libellants rely on Johnson and Schreuder and Norris, who were on board the ship, to prove that the schooner was close on the wind. They so testify, and, doubtless, correctly. But *when* do they say the schooner was on the wind?

Johnson says (p. 24, ans. 13 x,) the schooner was only four length's off from the ship when he first saw her.

Schreuder (p. 29, ans 3 x,) says the same.

Norris (p. 110, ans. 14,) says, when he first saw the schooner, she was, he thinks, 100 yards off.

Doubtless, the schooner was *very* flat on the wind when these witnesses first saw her, and pushing to windward as fast as possible. Her fault was, that she began too late.

I repeat, that assuming that the schooner was put on the

wind after passing Nix's Mate, whether she was kept there and held steadily to her course, must have depended on the competency and care of her helmsman; and we have plenary proof from disinterested witnesses on board two other vessels, that the helmsman of the schooner was either grossly incompetent, or grossly inattentive, or both.

The steamer "Huron" met the schooner, as the former was going up and the latter coming down the harbor, near a place called "the Lower Middle," about two miles and a half above "the Narrows," and the master of the Huron describes, (pp. 134, 5,) the grossly negligent manner in which she was steered.

The people on board the steamer Rescue confirm this in the most pointed manner, and show how negligently the schooner was steered in approaching the steamer.

Humphreys, (p. 118, Ans. 16, 17; p. 122, Ans. 23).
Bond, (p. 123, Ans. 10–13).
Cummiskey, (p. 127).

The fact was that from the time she passed "Nix's Mate," instead of being steadily on the wind, the schooner was so badly steered that she was getting more and more to leeward; and when she got as far as the steamer Rescue, just at the entrance of the Narrows, the schooner was so far to the leeward that the steamer had to keep off, suddenly and largely, to get out of her way; and if so, the schooner was then at least as far to leeward as the ship was.

Those witnesses on board the ship, who saw the schooner for the first time, after she had passed the steamer Rescue, and before anything was said on board the ship about luffing, and before it is pretended the ship had luffed, all swore *she was on the lee bow of the ship;* that is, they all swear she was then to the leeward of the course the ship was then steering.

Quinn, an able seaman, (p. 43, Ans. 13, 15, 19, 20, 9 x.)
Norris, 2d officer, (p. 110, Ans. 13–17.)
Jones, carpenter, (p. 116, Ans. 11–13.)
Jackaway, seaman, (p. 140, Ans. 4, 5, 17, 6 x.)

Others, who saw the schooner earlier, describe the change of her position and show that she gradually fell off further and further to leeward till she was on the lee bow of the ship.

Pilot, (p. 92, Ans. 27, 37, 38, 45, 46.)
Thompson, boatman in the Narrows, (p. 107, Ans. 20, 29.)
Burroughs, Master of Pequannock, (p. 146, Ans. 19, 20.)

The libellants have taken the depositions of three seamen who were on board the ship and they rely much on their testimony. But all three of these witnesses swear that the schooner was on the *lee bow* of the ship before the ship had made any change of her course.

Emmons, (p. 11, Ans. 4.)
Johnson, (p. 4, Ans. 26, 27–29.)
Schreuder, (p. 26, Ans. 4, 10, 3 x 4 x.)

This was before any change had been made in the ship's course. And it is plainly impossible that the ship, by luffing, could hit the schooner, which was on the lee bow of the ship, and whose course was the exact opposite of the course of the ship, unless the schooner luffed across the ship's bows.

The testimony of these witnesses and of Captain Donnell, an experienced shipmaster, who was a *passenger* on board the ship, (p. 47, Ans. 25), of the pilot, and of Burroughs, the Master of the Pequannock, (p. 146, Ans. 19, 20), proves that the ship did not luff on to the schooner, but that the schooner luffed across the bow of the ship; for they say that *they first saw the jib boom of the schooner* come out by the bow of the ship—this would be so, if the schooner was a little to the leeward of the ship, and luffed aross the ship's track.

It is submitted that the testimony of the libellants themselves disproves the position that the schooner, being to windward of the ship, and keeping her course, *the ship caused this collision by luffing*. It must be constantly borne in mind that before any

change of course, *the two vessels were sailing on opposite courses.* Now, if the schooner was at all to the windward of the ship, the ship could not strike the schooner on the lee side, at any considerable angle, without a decided and large change of course. Instead of proving such a change of course, the libellant's evidence shows that the collision took place *before* any *such* change of the course of the ship *had been effected.*

Hutchins, the Master of the schooner, (p. 70, near the top), says the ship hit the schooner "*instantly* she BEGAN to luff."

Childs, one of the hands on board the schooner says, (p. 78, Ans. 15), he observed "the ship luffed *a little.*"

Certainly these witnesses, so far from proving it, show that no such change of course *as was necessary to cause the collision* did, or could take place.

The testimony of the Master of the schooner, as to the positions of the ship and schooner, immediately before the collision and *before he says the ship luffed,* taken in connection with the established fact that before any change of course by either vessel, they were sailing on opposite courses, clearly proves that the schooner luffed across the track of the ship. He says, (p. 70, Ans. 7), "standing on the leeward side of the quarter, watching the ship closely, perceived the ship was heading about for our fore lee rigging. When within about one hundred yards, I ran forward to our fore lee rigging. Getting there, *and seeing that the ship did not alter her course,* I hailed her to keep off. They sung out to me from the forecastle of the ship, to luff. Soon as that order was given the ship *began* to luff, and the ship very soon hit us, *instantly she began to luff,* striking us on the larboard side, about midships, quartering aft."

Now observe, that *before any change in the course of the ship, before any pretence that the ship had luffed,* the schooner is standing across the ship's bow, the ship's bow pointing to the lee fore rigging of the schooner, and within three hundred feet.

Instead of being to windward of the ship, the schooner is making her way to windward, across the bow of the ship; and and when within three hundred feet, has only got so far to windward of the ship, that the ship's bow points to the schooner's fore rigging, and when they actually come together, the schooner has got one-half her length to windward, being struck amidships.

Taken in connection with facts which are admitted, or proved beyond controversy, this statement of the master of the schooner is enough to decide the case.

The pilot of the ship testifies that the ship's course was north-west by north, and there is nothing to controvert this.

The libel states and the master of the schooner swears, that the schooner's course after rounding Nix's Mate, was south-east by south.

Before any pretence of change of course of the ship, the schooner is found standing across the ship's bows, going to windward. within three hundred feet of the ship, and at the time of the collision is hit a quartering blow, about 'midships. It necessarily follows that the schooner had sagged and yawed to leeward, had got on the lee bow of the ship, then luffed across the ship's course, failed to get by and was hit about midships, a blow somewhat quartering, but so near a right angle, as to cut the schooner down to the water's edge.

This is still further confirmed by other facts stated *by the libellants'* witnesses.

Johnson (p. 25, ans. 23 x) says, "headway was nearly out of the schooner when we struck him." This *could* not be, if the schooner kept her course till the collision, as the libel states and her people testify. It could only be if the schooner luffed so strongly as to be nearly up in the wind's eye, and this witness expressly says (p. 20, ans. 17), that when hit, the schooner was luffing up into the wind.

The account given by the Mate of the schooner (p. 30, Ans. 3,) tends strongly to confirm this view. It is as follows:

After passing Nix's Mate, we luffed our vessel to, and hauled the sheets aft; then kept her off close on the wind. *A few minutes after that time, we saw a vessel coming.* The Captain says to me that he thinks there's a ship coming. I says, I think there's a steamship coming; I hear the sound of steam. She got along a little further, and she proved to be a steamboat, one of them. *The Captain thought that the ship was attached to the steamboat.* The Captain says to me, keep her as nigh as she'll go. I kept her up as nigh as she'd go. I had the helm. *We see the ship coming right for us that time.* When she was within about four ships' length, they sung out from aboard the ship, "Luff aboard the schooner." The Captain says, I can't luff; I'm close to the wind. The man aboard the ship says, You must luff. We see that after the mate sung out to us to luff, that the ship luffed, too. Two, three minutes after that time, she struck us."

Several things here are worthy of note.

1. Why did the Captain think the ship was attached to the steamboat, when, in point of fact, the ship was a quarter of a mile astern of the steamer and in the steamer's wake. The only solution of this is that the steamer and the ship were in range from the schooner; and if so the schooner was then as far to the leeward as they were.

2. "The Captain said to me, keep her as nigh as she will go." Why did he say this if the schooner was already as nigh as she would go; and had been kept there since rounding Nix's Mate.

3. "I kept her up as nigh as she would go." No doubt he then began to do so. He then saw the necessity of doing so, having got down so far to leeward. And he was no doubt startled by the hail from the steamer to look out for the ship astern, (p. 127, Ans. 15) and "keep your luff," (p. 124, Ans.

13) and the Master of the steamer Rescue says expressly the schooner did not then keep her course but luffed, (p. 127, Ans. 18).

4. "We see the ship coming right for us that time." But the ship had not then changed her course. There is no pretence that the ship luffed till after this. The reason why the ship was coming right for the schooner was, that the schooner was then luffing across the ship's bows, trying to get far enough to windward to escape the ship.

5. "The Captain says, I can't luff; I am close to the wind." No doubt he was *then;* his helm was *then* hard down and he was luffing into the wind as fast as possible, and so fast that as the libellants' witness Johnson says, "headway was nearly out of the schooner when struck by the ship."

It is true, this mate of the schooner was grossly incompetent for his place, and cannot be relied on upon any point of seamanship. He could not even box the compass, which is the A B C of a common sailor, but begins at E., puts in N. E. by N. twice; the first time, in place of N. N. E., and puts N. N. E. where E. N. E. should be (p. 33, 14 x) He first says, the schooner's course, after passing Nix's Mate, was S. S. W. (p. 33, ans. 20), repeats it (p. 35, ans. 46, x.) and then says it was S. S. E. (pg. 35, ans. 1) though the libel avers, and the master of the schooner swears, the course was S. E. by S.; and he swears that when the schooner had got as far as the steamer, she was within one and a half lengths of Gallup's Island (p. 33, ans. 18.) If he had said Lovell's Island, he would have been nearly correct; but he knew that would put him on the wrong side of the channel, where they really were.

In St. John *vs.* Payne, 10 How., this Court drew decisive inferences against the management of a vessel from answers of the helmsman, showing he did not understand his duty. In this case, we not only have such answers, but the testimony of the master of the "Huron," and the people on board the steamer

"Rescue" prove his *conduct* to have been in accordance with what might be expected of a mate who did not know how to box the compass, and swore he was stearing S. S. W. and S. S. E., when the libel avers, and the master swears, the course was S. E. by S.

There is another piece of direct evidence, which comes from the libellants' witness, Quinn, on whom they greatly rely, which seems to be decisive. He is asked (pg. 67, ans. 19 x), "For which shore was the schooner heading, at the time of the collission?" Ans. "*For the south shore—Gallup's Island.*" Now observe that the course of the schooner was S. E. by S., through the Narrows; and yet, at the time of the collision, she was heading *across the channel, to the south shore.* He was sitting on that shore, only a few rods off. He might be mistaken as to whether a vessel changed her course a point. It would seem he could not be mistaken as to this palpable fact, that the schooner had her head towards the shore, where he was.

It is submitted that the fair result of the evidence is, that the schooner, being very negligently handled, instead of being kept steadily on her course, had got so far to leeward as to be on the lee bow of the ship, before any change of the ship's course, and that, in then attempting to go to windward, across the bow of the ship, the collision happened.

It is admitted that when the vessels were very near each other, when, as the Master of the schooner testifies, the schooner was crossing the bows of the ship, the hail of the Mate of the ship to the schooner to luff, was misunderstood by the helmsman of the ship, who began to heave the wheel down. But we say:

1. That the course of the ship was not so changed, by reason of this mistake, as to cause the collision.

2. The schooner, instead of keeping her course, luffed across the bows of the ship, after passing the steamer, and thus occasioned the collision.

3. The schooner being in the wrong, for getting so far to leeward, and then attempting to run across the ship's course, and the hail of the mate to the schooner to luff being a proper hail under the circumstances, the schooner and not the ship is responsible for the mistake made in the confusion of the moment, and for all its consequences.

In support of the first and second positions, we rely on the evidence of the numerous witnesses, who testify that the wheel was so quickly thrown up, that no perceptible effect was produced upon the ship's course.

References to this evidence are placed in an appendix, A. and the Court is respectfully requested to peruse this evidence as thus brought together. Seventeen of these witnesses witnessed the collision, and among them are the master and mate of the Pequannock, Captain Donnel, an experienced ship master, who was a *passenger* on board the ship, and Thompson, a boatman, who was a casual spectator on board the Pequannock, who are disinterested witnesses.

It is true that some of the libellant's witnesses swear the ship luffed, and they undertake to say, by a general preconcert, about a point and a half. It is impossible there should have been this exact agreement about so very small a change of course, under circumstances of such haste and confusion, without preconcert. It must also be remembered that a change in the relative position and bearings of the two vessels would take place by the luffing of the schooner, as well as by the luffing of the ship, and *the effect being perceived*, might be attributed to the wrong cause.

It is not pressing the argument at all too far to say, that if of numerous witnesses, having equal means of knowledge, a large majority say, that the ship kept her course, and the residue say it was changed about a point and a half, it is a fair result that the change *must have been very small.*

And this is the direct evidence of the master of the schooner, who swears that, "*instantly* the ship *began* to luff, she hit us."

How can it be said, that it is proved by a clear preponderance of the evidence, that the collision was caused by the luffing of the ship.

But the Libellants now insist that even if the ship did not cause the collision by luffing, still there was sea room to the leeward and the ship was bound to have got out of the way of the schooner.

To this, we reply—

1. This is not the case made by the libel. The only fault there attributable to the ship is, that the ship luffed.

The Libellants can not now desert this case, and say, though true it is the ship did not cause the collision by luffing, she ought to have borne away and did not.

If vessels are on opposite courses, there is no duty incumbent on either to give way, or to change its course, if one is further to windward than the other; because if each keeps its course, they will go clear. The duty to give way arises only where they are steering *on converging courses*, or on opposite courses head to head, or so nearly so, as to occasion some reasonable apprehension of a collision, if the course of one or the other be not changed. To make a case of duty to give way *because on the larboard tack*, something more than that fact must be stated. *The courses of the two vessels and their relative positions must be shown.* Now the libel neither shows facts enough to found the duty to give way, nor does it state, even in the loosest and most general terms, that such a duty existed. So far from this, when it proceeds to show that the ship luffed, and so caused the collision, *by wrongfully leaving her course*, the necessary inference is that, if she had not left her course there would have been no collision.

It is submitted that the Libellants can not now abandon the only case they have made by the libel, and attempt to set up another case, not made therein, and *which is inconsistent with what is there charged.*

But if this view were not tenable, still, the Libellants have wholly failed to prove the essential elements of this new case. One of those essential elements is, that *the schooner kept her course.* Her course is avered and proved by the Libellants to have been S. E. by S. The ship's course is avered and proved to have been N. W. by N. And before the course of the ship had been changed, it is admitted by the master of the schooner, and proved by the evidence already referred to, that the schooner was standing across the ship's track, and must therefore have changed her course; and it is proved by direct and positive evidence, as well from the Libellant's as from the Respondent's witnesses, that, just after passing the steamer, the schooner luffed, and so strongly, that at the time of the collision, head-way was nearly out of her. How, then, have the Libellants supported by proof, this essential part of their case, that the schooner kept her course?

Neither have they shown, by a preponderance of evidence, that the ship was in fault for not keeping away.

This collision occurred in a narrow channel which is a thoroughfare of the harbor of Boston. The libellants are entirely aware that it is essential to their case to prove that when the collision happened the schooner was on the westerly or weather side, that is the schooner's right hand side, of that channel. *First:* Because it is a law of the sea (as it is of the land,) to keep to the right; and, knowing that the wind allowed and the usage of the sea required them to be on the right, or weather side of this narrow and crowded thoroughfare, they would be plainly in the wrong if they were not there; especially since their vessel, a small schooner, drawing little water, and easily handled, was under no necessity to be even in the middle of the channel.

And, *secondly:* Because, if the collision happened on the lee side of the channel, and while heading over towards the other side, it is plain the schooner had changed her course, and was

standing, not on her course through the channel, but across the channel and across the ship's bow.

They, therefore, begin by averring in the libel that — "said schooner was on the windward side of the channel," — "that there were two-thirds of the said channel to the leeward of the said schooner."

The people on board the schooner were also aware that this fact was essential to their case, and, accordingly, some of them testify, that they were in that part of the channel where they know they ought to have been, and where the principal witnesses, viz: the master, and the mate who had the helm, were grossly in fault, if they were not.

Accordingly we find the Mate (p. 31, Ans. 7,) says they were on the *western edge* of the channel. The Master, (p. 70, Ans. 13,) that two-thirds of the channel were to leeward. And two of the crew of the schooner, Pells, (p. 37, Ans. 24,) and Mye (p. 40, Ans. 19,) also follow the Master and say two-thirds of the channel were to leeward. The libellants produce two witnesses, who were not on board the schooner, Quinn and Lannin. They say they think the schooner, at the time of the collision, was very near mid-channel, *but a little more to the eastward, or leeward;* (p. 13, Ans. 23, p. 154, Ans. 16,) and the two witnesses of the ship's crew, whom they examined, say also that the schooner at the time of the collision was *to the leeward of the middle of the channel* (p. 20, Ans. 10, p. 27, Ans. 5). So that the only disinterested testimony they adduce disproves the allegation of the libel and the testimony of their interested witnesses, and shows that at the moment of the collision, *after all their luffing across the channel*, the schooner had not got to the centre of the channel.

Now weigh against this the testimony of sixteen witnesses, produced by the respondent, including not merely the officers and crew of the ship, but, Captain Donnel, who was a passenger on board the ship, the Captain and Mate of the Pequan-

nock, two boatmen, who were mere spectators, and the Master, the Mate and the steward of the steamer Rescue, and the clear preponderance of the evidence is that the collision took place on the lee side of the channel.

I do not undertake to say just how many feet from the shore; that, no witness can conscientiously undertake to state with precision. But I submit, there can be no reasonable doubt that although the schooner had been luffing to windward, after passing the steamer, she had not got to the middle of the channel when the vessels came together, and was still on its lee side and near the lee shore.

Quinn, (p. 43, Ans. 5–8).
Captain Donnel, (p. 47, Ans. 11).
Crocker, (p. 50, Ans. 5).
Gage, (p. 59, Ans. 49).
Wallace, (p. 44, Ans. 5).
Williamson, pilot, (p. 91, Ans. 13, 19, 20).
Thompson, spectator, (p. 106, Ans. 14).
Norris, 2d mate, (p. 110, Ans. 5–7).
Jones, carpenter, (p. 115, Ans. 3–6).
Cummiskey, master of steamer Rescue, (127, Ans. 16).
Bond, mate of steamer Rescue, (p. 123, Ans. 6).
Humphreys, steward of the Rescue, (p. 18, Ans. 8).
Brown, spectator, (p. 138, Ans. 5–10.)
Jackaway, mate of the Pequannock, (p. 140, Ans. 15).
Burroughs, master of Pequannock, (p. 146, Ans. 15).

It is respectfully submitted that the libellants have not shown what it is essential they should show, in any view of this case :

First: That the schooner did not change her course.

Second: That she was on her right hand side of the channel, where she was bound to be.

That, on the contrary, it appears by the clear preponderance of the evidence, that the schooner had been so handled by her negligent or incompetent helmsman as to get into the track of

inward bound vessels, and, in the effort to get out of it, changed her course, ran across the track of the ship, and so caused the collision.

Much reliance is placed by the Libellants on the fact, that when the mate went forward, by the order of the pilot, to watch the schooner, he first called out, "All right,—she is going to windward."

Two things are clear; and they are very important considerations. The fact that the first officer of the ship was seasonably sent forward by the pilot to observe the schooner, proves there was no want of vigilance. The schooner was seen, and the best possible precaution was seasonably taken. And as there is no ground for imputation of want of seamanship of the mate of the ship, and as he was there to observe what was proper to be done, and as his duty and his personal safety united in requiring him to observe and report what was needful to be done by the ship, it is but a fair inference that he correctly saw what was material to be seen, and as he gave no order to change the ship's course, that no such change appeared to be necessary or proper. On any other supposition his conduct is inexplicable.

Undoubtedly he said the schooner was going to windward, because he believed so; and he then had sufficient reason to believe so.

I refer, with confidence, to his account, (p. 55, Ans. 16) as a consistent and clear statement, as precise as such a hurried and rapidly changing scene admits of. When he said, the schooner is going to windward, *the schooner had not passed the steamer.* If, instead of keeping on and forcing the steamer to get out of the way, the schooner had, even then, luffed close *to* the wind, there can be no doubt she would have gone clear to windward, as the Mate, seeing what she could do, and seeing she was on the wrong side of the channel, rightly expected her to do. One misfortune was that the Master of the schooner supposed the ship *was in tow of the steamer;* and, knowing that the steamer

could and would get out of his way, supposed the ship would go with her. He expected this steamer and ship to treat the schooner, as the steamer Huron, having a ship in tow, had treated the schooner a few minutes before; that she would stop and back, or do whatever else might be necessary; and therefore, until after he was warned by the hail from the steamer Rescue—"luff, look out for that ship"—the schooner was not doing what she could and ought to have done to get to windward. Then she tried to do so; but it proved to be too late.

Before the schooner had passed the steamer neither the Mate nor the people aboard the ship, nor any spectator, had reason to apprehend a collision, and doubtless did not apprehend one.

Some of the libellants' witnesses say they did not apprehend a collision until the ship luffed. But this is entitled to no weight. If the ship luffed perceptibly, (and it is submitted the evidence shows she did not,) it is clear, as the master of the schooner says, that, *instantly* she *began* to luff the vessels were in collision. But *before* that, the libel avers that the master of the schooner hailed the ship to keep off, and the mate of the ship was shouting to the schooner to luff, and the schooner was crossing the bow of the ship, and luffing so strongly that she had very little headway, and the ship was going about eight knots, and the two were only a few lengths apart. To attempt to maintain that no one apprehended a collision under these circumstances, till after the mate had hailed the schooner to luff, and that hail had been mistaken by the helmsman of the ship, and he had got his wheel down, and the ship had answered it and begun to come up, is to attempt to substitute the loose and unreliable recollections of witnesses respecting the precise time of their intellectual operations of hope and fear, for the palpable and controlling facts of the case.

There is one other view of this case, to which the attention of the Court is respectfully solicited.

If the Libellants could succeed in satisfying the Court, that the ship did luff, and so caused the collision, it is plain that it

arose from a mistake by the helmsman of the ship, of the hail of the mate to the schooner to luff, and if, as is submitted, the schooner, instead of keeping steadily on her course, had been so badly handled as to get on the lee side of the middle of the channel, and then altered her course, and was crossing the bow of the ship, and the hail was the consequence of this improper conduct of the people of the schooner, the schooner and not the ship is responsible for the consequences of the innocent mistake of the helmsman of the ship.

The Genesse Chief, 12 How. 443.
Fretz *v.* Bull, 12 How. 466.

And it is further submitted, that if this be not tenable and the ship was in fault by reason of this mistake, the schooner was also in fault for being on the wrong side of the channel and for changing her course when and where she did, and so the damage should, at the utmost, be apportioned between them. And here the respondents rely on the libel itself, to show what the schooner could and ought to have done; and upon the evidence, which fails to prove the schooner to have been on the windward side of the channel, or to have kept her course, but clearly disproves both.

B. R. CURTIS,
of Counsel with the Appellants.

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APPENDIX A.

The Marcellus did all she could to avoid the collision, and did not luff.

Williamson—95–6, (61, 62, 69, 70, 78,) 100, 1, (39–40,) 101 (47,) 103, (70, 73, 74,) 94–5, (53, 54, 55, 56,) 97, (34, 56,) 94–5, (39, 62,) 100, (37, 38,) 103, (65, 66).

Crowell—54, (14,) 56, (27, 30, 31).

Donnell—47–8, (13, 14, 16, 21, 22, 23, 28, 29).

H. M. Quinn—43, (10).

Lothrop—63, (34).

Croker—51, (11, 12).

Wallace—65, (11, 6).

Brown—138, (13, 14).

Thompson—105–6, (3 to 11).

Jackaway—140, (4 to 14, (142, (14 to 18,) 144, (2 to 4).

Burrows—145–6, (5 to 14,) 149, (19).

Humphreys—120, (28).

Emmons—11–12, (4, 14, 15, (12–13, (16, 17, 20,) 13, (27,) 12, (10, 11,) 16, (34, 35,) 18, (4).

Johnson—21, (23, 27, 28,) 22, (45, 47, 48, 49,) 19, (5,) 24, (14, 15,) 25, (22).

Schreuder—28, (28, 29).

Walker—34, 5, (41 to 45).

Mye—39, 40, (15, 17).

Childs—78 (13).

APPENDIX B.

The schooner was improperly navigated, irregularly steered. She appeared to be going first to *windward*, then kept off to the *leeward*, and at last suddenly *luffed* across the ship's bows, causing the collision.

Williamson—92–7, (27, 37, 38, 40 *to* 59, 63, 66, 67, 68, 73, 74, 75, 77, 82, 83, 84,) 98–100, (13, 17, 18, 27, 29, 31, 36,) 102–3, (52, 53, 54, 59, 62, 63, 64, 68).

Crowell—54–6, (11, 16, 19, 20, 21, 22, 23, 24, 25).

Norris—110–11, (13 to 16, 17, 18, 21, 23, 2, 3,) 112–13, (6, 9, 20, 21,) 114, (47).

Emmons—11, (4,) 13, (19, 20,) 15, (10).

Johnson—20, (12, 17,) 21, (22,) 25, (23, 27, 30).

Schreuder—26, (4,) 27, (6, 10).

Mye—40, (18,) 41, (11).

H. M. Quinn—43–4, (13 to 22,) 45, (7, 17).

Crocker—50, (9).

Lothrop—60, (13 to 16,) 62, (22, 20,) 63, (27, 28, 32.

Wallace—64–5, (6, 7, 8,) 65–6, (6, 11).

John Quinn—75, (6).

Childs—78, (10).

Jones—116, (11, 12, 13, 14).

Humphreys—120, (30, 31, 32, 5,) 121–2, (21, 24, 25, 26, 28, 30, 34).

Cates—134–5, (5, 7, 9, 10, 13, 14, 15,) 136, (4, 10, 14, 15,) 137, (1).

Bond - 123–4, (10 to 19,) 124–5, (6, 10.)

Cummiskey—126–7, (10 to 16,) 127–8, (8 to 29,) 129, (31,) 129–30, (4, 5, 9,) 12, 132, (35,) 133, (47,) 133–4, (1 to 6, 49.)

Donnell—47–8, (17, 25, 27,) 48, (31, 32, 33, 36, 37, 38,) 49, (2,) 50, (14,) 56, (28, 29).

Thompson—107, (18 to 29).

Jackaway—144, (7).

Burrows—146–7, (18 to 28) 149, (21).

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Supreme Court of the United States.

No. 177.

DECEMBER TERM, 1861.

JOHN A. BAXTER AND AL., CLAIMANTS OF SHIP MARCELLUS, APPELLANTS,

vs.

HUGH N. CAMP AND AL., LIBELLANTS.

ADMIRALTY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF MASSACHUSETTS.

ABSTRACT AND POINTS FOR LIBELLANTS, APPELLEES.

Supreme Court of the United States.

ADMIRALTY. DECEMBER TERM, 1861.

HUGH N. CAMP ET AL.

vs.

SHIP MARCELLUS.

APPEAL FROM CIRCUIT COURT UNITED STATES, MASSACHUSETTS DISTRICT.

LIBELLANTS' POINTS.

THIS is a Libel for Collision, in which the Libellants seek to recover of the Claimants the value of a cargo of sugar, lately laden on board the schooner Empire, and which was sunk and lost by a collision with the ship Marcellus.

The collision occurred about 7 o'clock, on the evening of September 27th, 1859, in that part of the principal channel in Boston harbor, between Lovell's and Gallup's Islands, known as the *Narrows*.

The schooner was at the time bound out of the Harbor, on a voyage to Bristol, R. I., and had her starboard tacks aboard. The ship was bound into Boston, on a voyage from Singapore, and had her larboard tacks aboard.

The vessels came in collision at just about the upper westerly point of Lovell's Island, in or near the narrowest part of the Narrows.

The ship struck the schooner, head on, her cut-water taking the schooner on the larboard side, just about midships, heading somewhat towards the schooner's stern, "quartering aft," and making at once a wreck of her.

Hutchins, p. 69, Int. 7.
Emmons, p. 17, Cross-Int. 42.
Schreuder, p. 27, Int. 8 and 9.

The Libellants aver that before and at the time of the collision, the schooner was sailing close-hauled on the wind, with her starboard tacks aboard, and with all the sails she could make draw; that said schooner was on the windward side of the channel, steering south-east by south, and the wind was south-west by south, and was working up to the windward to give the ship all the room possible; that the said ship was sailing into the Port of Boston at great speed, and had the wind free, and was able to pass said schooner without difficulty; that there were two-thirds of the said channel to the leeward of said schooner; that as said ship approached said schooner, the persons on board said schooner hailed her to keep off; a reply came from the ship to luff on board the schooner, but this was impossible, as the schooner was close to the wind; that the schooner did not alter her course, and ought not to have done so under the circumstances; that the ship, immediately after the hail to the schooner to luff, luffed and instantly ran into and upon the schooner, striking her near amidships, taking both masts, and cutting her down; that the ship and schooner both having lost headway, and the ship being still afoul of the schooner, they drifted together to the leeward shore; that the schooner filled rapidly, and in about ten minutes after the collision, sunk, and all said sugar was totally lost and destroyed. Libel, p. 2.

The Libellants upon the evidence and law in this case maintain

I.

That the schooner (Empire) was sailing before and at the time of the collision close hauled on the wind,—and could not and ought not to give way.

II.

That the ship (Marcellus) was running with the wind free, all sail set except studding sail, and could and ought to have given way.

III.

That the collision occurred in the centre or to windward of the centre of the channel, at a point where the Narrows are 370 feet at least in width,—thus affording the ship ample room to have given way.

IV.

That by the Rules of Navigation, the ship under these circumstances, was bound to give way and clear the schooner.

V.

That the ship did not give way, but on the contrary, as the vessels approached each other, the schooner going to windward as she ought, the mate of the ship hailed the schooner several times to "luff," when the helmsman of the ship, supposing the order to be for the ship, put her wheel down, or nearly so, and thereby caused *her to luff* about one and one half points, and *by reason of the luff* struck the schooner, and *but for this luff*, would have safely passed the schooner to the leeward.

POINT I.

The Empire was sailing close hauled on the wind, before and at the time of the collision, and could not and ought not to give way.

This appears (apart from the express testimony, to be considered presently) from the course of the wind and of the channel

The witnesses are nearly agreed as to the wind.

Johnson (an able seaman on board the Marcellus) says, p. 23, Int. 54 and 55: The wind was *south-west and by south*, and that he looked at the compass about fifteen minutes after they struck.

Emmons, (steering the Marcellus,) p. 12, Int. 12, says, "About *south-west, south-west by south*, as nigh as I can judge from the notice I took of it."

Walker, (steering the Empire,) p. 32, Int. 15, says: *South-west by south.*

Hutchins, (captain of the Empire,) also says: South-west by south, p. 71, Int. 18.

Schreuder, (able seaman on Marcellus,) says, p. 27, Int. 14, About south-west by south, south-south-west.

Lannin, p. 155, 4 cross: I think the wind was about south-west, south-south-west.

H. M. Quin, p. 45, 16 Cross: I could not say exactly; but it was about south-west.

Thompson, p. 106, Int. 12: About south-west.

Donnell, p. 46, Int. 8: South-west. P. 47, Int. 12: About south-west. P. 49, 2, and 12 Cross.

Norris, p. 110, Int. 6: South-west, I should judge.

Humphreys, p. 118, Int. 7: About south-west.

See p. 120 and 121, Cross Int. 1, 5, 7, 8.

Cumminskey, p. 126, Int. 5: "I should call it south-west, as nigh as I should judge; I won't say that on oath, because it might have varied half a point either way."

Jackaway, p. 141, Int. 18: About south-west.

Burroughs, p. 146, Int. 17: About south-west.

Crowell, mate of Marcellus, p. 54, Int. 4, says: The wind was south-west. I know it from having looked at compass when we were eight or ten miles outside of Boston Light.

But in this statement Crowell is contradicted by the pilot of the Marcellus, another of Claimants' witnesses, who says, p. 91, Int. 14: The wind was *about south-west;* and Int. 16: It had changed from *south-south-west.* It changed about the time he was three miles outside the Boston Light.

So that the pilot, as the ship was going about nine knots, concedes the wind south-south-west about twenty minutes only before the collision.

The only importance of the question as to the wind, is as it bears upon the question whether the schooner was sailing close hauled.

Three say, positively, *south-west by south,* and all the rest, with a single exception, about south-west by south, or about south-west.

From the course of the channel and the wind, the inference is almost conclusive, that the Empire was close hauled.

The channel through the Narrows (outward) runs from Nix's Mate to Gallup Island Point, south-east, one-half south; from thence to Spit Light, south-east, one-half east.

Hutchins, p. 71, Int. 24.
See Coast Survey Chart.

If the wind was then south-west by south, the schooner would have six points, which is as near as such a vessel ordinarily will lay to the wind, if south-west, she would then have but a point more.

If therefore the captain of the schooner, after rounding Nix's Mate, took the usual and ordinary course, and there does not appear the slightest occasion for him to vary from it, then his schooner was close on the wind.

But this *fact* is not left to inference. *That the schooner was sailing close hauled appears*

First—

From the concurrent testimony of every person who was on board of her. They all agree that upon rounding Nix's Mate she hauled her sheets chock aft, and kept, from that moment to the time of the collision, as close to the wind as she could lay and have headway, and they must know positively how the fact was.

Hutchins, p. 69, Int. 7; p. 71, Int. 19, 22.
Walker, p. 30, Int. 3; p. 31, Int. 13; p. 32, Int. 19; p. 35, Cross 46, 47, 48, 51; 2d Dir. Re.
Pells, p. 36, Int. 5, 6, 7; p. 38, Int. 28.
Mye, p. 39, Int. 4, 5, and 15.
Childs, p. 78, Int. 5, 6, 7, 8, and p. 79, Int. 20.

Second—

Two witnesses, able seamen, and standing on the bow of the Marcellus, in a very favorable place to see, say the same.

Johnson, p. 20, Int. 12: Close on the wind.
Schreuder, p. 27, Int. 6: Full and by and close on the wind.
Norris, 2d mate of *Marcellus*, says, p. 112, 8th Cross: *She was pretty near the wind, I should think.*

Third—

But more conclusive still is the evidence of Capt. Quinn, master of the yacht Young America, and Lannin, a man with him, sitting on the rail of that boat, then aground on Gallup Island, and about twenty rods from the place of collision, and both observing carefully the schooner.

Quinn, p. 73, Int. 7: She was on the wind. See p. 74, Int. 20, and p. 75, Cross-Int. 2 to 13.

Lannin, p. 153, Int. 12: Close-hauled on the wind.

These two witnesses also must have positive knowledge of the matter.

The evidence of those who say the schooner was sailing free, say generally she was free, from the opinion they have as to how the wind was, and how she must have been going; and therefore they may be in error, and yet suppose they are correct; but the evidence of those actually sailing the schooner, who speak of what they must know, and of the two witnesses connected with neither vessel, who must have seen what they speak of, if untrue, must be willfully so.

Fourth—

The fact of the schooner being close on the wind is further confirmed by the *uncontroverted fact of the rate of her motion.*

While the ship is conceded to have been going from eight to nine knots the hour, the schooner was going but three or four.

Schreuder, p. 29, 11th Cross: About three miles.
Walker, p. 35, 50th Cross: About three knots.
Pells, p. 36, 9th Int.: Thinks from three to four knots.
Mye, p. 39, 6th Int.: Thinks about three or four knots.
Hutchins, p. 71, 30th Int.: About three or four knots.

POINT II.

The ship was running free;—coming up the harbor with all sail set except studding sail, and the lee clew of her main sail, and with fine breeze.

Answer, p. 9.
Cummiskey, p. 125, Int. 2.
Williamson, p. 102, 50th Cross: She was going about eight knots.
Hutchins, p. 71, Int. 29. Judges about nine knots.

If both vessels had the wind free, the ship was bound by the rules of navigation to have kept off, but *a fortiori* if the schooner was close hauled.

The Claimants make little attempt to show the schooner to have been free, but allege as an excuse for not giving way, that the ship was so near the lee shore that she could not keep off with safety to herself.

It is important to ascertain whether it be true that the ship was so near the lee shore that she could not give way.

POINT III.

The collision occurred in the centre, or to windward of the centre of the channel, at a point where the Narrows are 370 feet wide at least; thus affording the ship ample room to have given way.

The collision occurred at a point where the Narrows are 370 feet wide, (Williamson, the pilot states, p. 92, Int. 18,) and on about the angle of the two courses, about where the two courses meet. (Hutchins, p. 71, Int. 24.)

The question is, in what part of this channel, as between the two shores, the collision occurred.

The Libellants aver to the windward of the centre. The Claimants say within thirty or forty feet of the lee shore.

The Libellants call *three* witnesses, all able seamen *from the Marcellus. Five* from the *schooner*, and *two* from the shore, twenty rods (about) from the collision, who all agree that the collision took place near the centre of the channel—some saying a little to leeward of centre, and some a little to windward.

Emmons, (steering Marcellus,) p. 13, Int. 23 and 24.
Johnson, (on the bow of Marcellus,) p. 20, Int. 10; p. 21, Int. 34.
Schreuder, (on board of Marcellus,) p. 27, Int. 5 and 18.
Walker, (steering the schooner,) p. 31, Int. 7; p. 32, Int. 16.

Pells, (man on schooner,) p. 36, Int. 8, 10; p. 37, Int. 17, ~~22~~ 24. 25
Mye, (man on schooner,) p. 39, Int. 7; p. 40, Int. 19.
Childs, (boy on schooner,) p. 79, Int. 21, 22.
Hutchins, (Capt. schooner,) p. 70, Int. 13; p. 71, 17, 25.
Quinn, (Capt. yacht Young America, and sitting on her rail twenty rods from collision, watching both vessels,) p. 74, Int. 11, 22.
Lannin, (in same place with Quinn,) p. 153, 12 Int.; p. 154, 16 Int.

The Claimants endeavor to control this positive and preponderating evidence by the unreliable attempt of seamen to state *how many feet the ship was from the lee shore.*

1. H. M. Quinn, (seaman on Marcellus,) who says, p. 43, Int. 8, that at collision, Marcellus was not more than 30 or 40 feet from shore. In his 14th and 15th Cross, page 45, he says, schooner might have gone between ship and shore with little scraping, and might not—that is, scraping so that some of the yards or rigging would take, which shows he has given the distance much too little; for the ship's yards must have extended 30 feet over sides, Jackaway, p. 144, 4th Dir. Res., and the schooner had a beam of over 23 feet. Littlefield, p. 85, Int. 7.

As to his ignorance of the locality, see p. 42, Int. 3, and p. 45, 6th Cross.

2. Donnell, (a passenger on Marcellus,) p. 46, Int. 9, says; Within 30 or 40 feet; but in his answer to Int. 33, p. 48, he says the schooner could have gone between the ship and shore, and shows a like palpable error with Quinn, as to the distance the ship was from the shore.

3. Crocker, (a boy on Marcellus,) p. 50, Int. 5, says, about 40 feet from leeward, and (Int. 6) 200 from windward shore. The latter statement puts the ship near mid-channel—both can't be correct.

Williamson, p. 92, Int. 18.

But see p. 53, Cross 27, 29 and 30, and Ch. Re., 2 and 3, by which it seems he did not look at the lee shore till after collision.

Crowell, (mate of Marcellus,) p. 54, Int. 8, says Marcellus was within 30 feet of the land.

The impossibility of this statement being true, appears as well in the evidence already cited, as in the consideration of certain facts connected with the collision. (See p. 15, 16 and 17.)

It is in flat contradiction of the two witnesses of Claimants, who think the schooner could have gone between Marcellus and shore, as the yards of the ship would have extended to the shore.

Gage, (cabin boy on Marcellus,) p. 59, Int. 4, who only says the ship was close to the shore; but (Int. 3) he saw nothing before the collision, and in the Narrows the ship was close to both shores.

Lothrop, (a boy on Marcellus,) p. 60, Int. 9: The Marcellus was nearest the lee shore, could not tell how near; thought about 50 feet. He took no particular notice. See 2 and 3 Cross, p. 61.

Wallace, (seaman on Marcellus,) p. 64, Int. 5, only says ship was nearest the leeward shore.

Thompson, (a stevedore's runner,) says he boarded a coal schooner that was coming up a little astern of the ship, and stood talking with the captain of her at the time—(p. 105, Int. 3 and 10 Int.)—and also pretends to say that *he saw the schooner, before the collision, luff.*

Both the captain and the mate of the schooner are called by Claimants, and both say they have no recollection of any man coming on their schooner at the time, and that for some moments before the collision the schooner Empire was not visible from their schooner.

Burroughs, p. 146, 20 Int., p. 148, Cross, 2, 3, p. 149, 20 and 25 Cross.

Jackaway, p. 141, Int. 17, p. 144, 36 Cross.

(P. 106, Int. 14,) Thompson says the ship was 45 to 60 feet from lee shore; but see his Cross-ex. for value of his opinion; p. 108, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18 and 19 Cross-Int.

The *only other* distance or measure he would attempt to give is p. 109, 6 Cross, where he says Narrows may be *over* or under 1,000 feet. Pilot states the width 370 feet.

Williamson, p. 92, Int. 18.

Norris, (2d mate Marcellus,) p. 110, Int. 7: About 40 feet, *I think.*

He says he was amidships, talking with carpenter. Nothing had attracted his attention. He first saw schooner, thinks 100 yards off, (14 Int.) He was in no position to judge ; but see his 29, 30, 31 and 32 cross, p. 113, from which it appears that although he had been 2d officer 13 months, in the Marcellus, he could not tell her length, and on being pressed for his opinion, says she is 200 feet long. Her exact length is 149 feet. Littlefield, p. 85, Int. 7.

Jones, p. 115, 5 Int., (carpenter of Marcellus.) Think the Marcellus was nearest lee shore, and not over 40 feet off. The ship had been very near the shore for *ten* minutes.

An inspection of the chart will show that the ship, one minute before the collision, must have been, on any theory, 200 feet from the shore. Williamson, p. 98, Cross 7.

See also p. 116, Int. 21, as to notice he was taking.

Brown (a slush man) says he was in his boat, which was hitched to the lee main chain of the Marcellus, and that she was near the shore ; he *could throw a chip of a stone ashore*, and that *two* or *three* minutes before, she was in *mid-channel*. p. 138, Int. 8 and 12.
This witness strongly confirms the statements of Libellants.

Burroughs, (Capt. of coal schooner.)
Jackaway, (Mate of coal schooner.)

These two witnesses were on a schooner coming up astern of the ship, and Jackaway says, (p. 140, Int. 15,) 30 or 40 feet, but, p. 142, Cross 9, his attention was not called to the matter till several months after the collision.

Capt. Burroughs says, p. 146, Int. 15, she was about *fifty* feet, to the best of my judgment, as near as I can tell, but did not take particular notice before collision, p. 149, Cross-Int. 17, and his attention not drawn to the matter since, till several months after collision, p. 149, Cross 26. They were astern of the ship, and did not see the schooner or expect a collision till it happened.

Their recollection differs widely as to the transaction.

Jackaway, p. 142, 15, 16 and 17 Cross, says at the collision, the coal schooner luffed a point to clear the ship, and would not otherwise have cleared her.

Capt. Burroughs says, p. 151, 51 Cross, they had not altered her course.

In connection with this see Cummiskey, p. 130, 19, 21, 22 and 17 Cross, from which it appears that immediately after the collision, the schooner in which Burroughs and Jackaway were, was over to the extreme windward of the channel, and therefore at the collision was much further to windward than they now suppose.

To the Claimants' other witnesses we are to add the pilot, a deeply interested witness.

He says, p. 92, Int. 19, should have passed the point within *forty feet, I suppose*, but did not reach it because the collision intervened. 34 Int., p. 93, Marcellus not over 40 feet from lee shore at collision.

A glance at the chart shows that a course laid so as to go 40 feet from upper point could not bring a ship within forty feet of it till the moment it was reached. Williamson, p. 98, 7 Cross-Int.

But that the ship was not so near there, appears from his other statements.

See p. 97, 1, 2, 3, 4 and 6 Cross, with p. 93, Int. 28, from which it appears that the course up the channel here is northwest by north, if in *centre of channel*, and that was the course the pilot was steering that night—*See chart.*

It would be very singular if rounding the buoy at Point Alderton as the ship did, p. 98, Cross-Int. 6, she should then run down to within 30 or 40 feet of a lee shore, with no reason whatever. There is every probability, her choice being thus shown to be entirely free, that she took the usual course.

Again, at the time of this collision, the pilot was jumping at and correcting the error at the wheel, and watching the schooner.

Emmons, p. 11, Int. 4.

Further observe his inaccuracy in measurements:

P. 103, 69 Cross, he says, Marcellus is 100 feet long, 500 tons, about, and perhaps 28 feet wide.

She is 149 feet long, 659 tons, 31 feet wide. Littlefield, p. 85, Int. 7.

These are all the witnesses who testify from observation of the place of collision.

The steersmen of both vessels agree that she was as far as mid-channel to windward.

All the Libellants' witnesses on this point were in favorable position to see, and did see the position and danger of the vessels at the time, and their attention was drawn to them.

Further, they state the place of the vessels relatively to the channel, as in *mid*-channel. Here is less liability to err than in attempting to give a distance in feet.

The ship was 31 feet wide, her yards extended 30 feet on each side, and with all sail set she occupied about 90 feet—nearly one third of the channel—so that if she were in mid-channel, only one-third of the channel would be to leeward, and so would seem nearer to the shore in feet than she was.

Jackaway, p. 144, 4 dir. res.
Littlefield, p. 85, int. 7.

Distances over water are deceptive, appearing less than they are, and these witnesses of claimants, three of whom were boys, coming in from a long voyage, may naturally suppose they were much nearer than they were to the shore, and would most likely err widely in attempting to give the *number of feet* of distance.

The Claimants, to confirm their testimony upon this point, have called another class of witnesses, and attempt to show that the steamer Rescue passed up ahead of the ship, and that the ship followed in her wake, and so to fix the place of the ship at the time of the collision.

This is extremely unreliable evidence, if admissible at all. Its value depends on two hypotheses—1st. The tug-boat went within so many feet. 2d. The ship was in her wake. Neither is established.

The Rescue left the ship a long way below the place of accident, and was running along some half mile or more ahead of her, and not having the least interest or occasion to observe where she was sailing, and at the time of the collision was from a quarter to a half a mile off, a point of land intervening, and so far as not to be able to see the collision plainly.

Humphreys, (the witness called from the Rescue,) p. 121, Cross 17. Were half to three-quarters of a mile ahead of the Marcellus, and p. 119, Int. 24. "I could see the loom of them together; couldn't see them plain. There wasn't daylight enough to swear you could see them come together. It was a little dusk."

Bond, p. 124, Int. 18. "I saw the vessels come together, but not very plain. I heard the crash plain enough. I just bobbed my head out of the wheel-house."

Cummiskey says, p. 127, 16, and p. 128, 22 Int., that the point of land was between him and the ship, and he saw her over the land, and was looking at the vessels when they came together, but does not attempt to say how far from land they were.

The evidence of this kind is:

Humphreys, p. 118, Int. 9: Judged ship passed within *thirty-five to forty* of Lovell's Island, as the steamer passed within 25 or 30 feet, about; but they were one-half to three-fourths of a mile from the ship, and it is all guess.

P. 121, 17 Cross.
P. 119, Int. 24 and 27.

Bond judges ship *would have gone* within *thirty to fifty feet* of *upper point* of Lovell's Island, if she had not come in contact with the schooner.

P. 123, Int. 4, 5, 6 and 18. See p. 124, 2, 3 and 5 Cross.

Mere guess work. He had no reliable means of observation.

Cummiskey, p. 126, Int. 4, says: It was a little dark at the time. The ship followed *as far as could see.* Might have varied a little; couldn't say how much.

P. 126, 7 int. and p. 131, 28 cross. Thinks now he went within 30 or 40 feet of Island. When he testified in District Court, he thought within 70 or 80, but will not now swear it was not 70 feet, nor does he believe any one of his crew will. Further for value of his opinion,

See p. 131, cross 24 and cross 28: Channel 300 *yards* wide: the width 370 *feet.*

Williamson, p. 92, int. 18.

But he did not observe the ship after he passed her.

P. 129, 1st cross.

There is better data in Cummiskey's deposition for fixing place of the schooner. After he rounded the point of Lovell's Island, and headed so as to clear Nix's Mate, the schooner was to his windward.

P. 130, 11, 13, 15 and 16 cross. See chart.

The coal schooner coming up just behind the ship, he encountered to the extreme windward of the channel.

Cummiskey, p. 130, 19, 21 and 22 cross.

These facts and circumstances all show that the Rescue was at the time in the centre of the channel, and the ship also, if she followed in the wake of the steamer, as they *guess* she did.

The evidence from the Rescue is extremely inconclusive and unreliable for the purpose of throwing any light on the question of where the ship was at the collision; especially while we have the positive statements of Capt. Quinn, and Lannin of the yacht Young America, Williamson, the pilot of the ship, and Jackaway, mate of the coal schooner, who say the ship was running up in the usual place of vessels of her size as the wind then was.

Quinn, p. 74, int. 11 and 12.
Williamson, p. 93, int. 33; p. 97, 1, 2, 3 and 4 cross.
Williamson, p. 98, 8 cross.
Lannin, p. 154, int. 16.

Bond and Humphreys both say that the steamer Rescue was running up in her usual course and made no change except when they passed the schooner, which was a long way above the place of collision.

Bond, p. 125, 9, 10 and 11 cross.
Humphrey, p. 122, 22 cross.

The wind was blowing so that Lovell's Island was *the lee shore*.

What occasion for the Rescue to run up clear in on lee shore? It is improbable she should so have done.

And far more improbable that a ship with a channel of 370 feet before her should choose a course within *thirty-five* or *forty* feet of a *lee shore*, especially where it is evident that if she failed in fetching round the point of Lovell's Island, she would inevitably go ashore.

An attempt was made to show by Bond, and Humphreys, the cook of the tug boat, that when they passed the schooner she was yawing two or three points each way. So strange conduct would have been likely to have attracted the notice of the Captain of the Rescue, but he does not speak of it. It is contradicted positively by Capt. Quinn, of the yacht Young America, and others.

Quinn, p. 73, int. 7 and 8, and p. 75, 2, 3, 4 and 5 cross.
Capt. Hutchins, p. 71, int. 20.
Childs, p. 79, int. 20.

The other witnesses of Libellants were examined before this proof was offered, and had left, but all state that after she rounded Nix's Mate she kept a straight course close on the wind. The evidence on this point has been before referred to.

After all Libellants' witnesses were called and had testified and left, Respondents called Francis C. Cates, Captain of the steamer Huron, to testify to meeting the schooner Empire half an hour before the collision.

The Libellants object to it as inadmissible in the case.

If admissible it is immaterial, and would have been contradicted if averred or taken in proper time.

They met in a distant and different part of the harbor, if at all, where their courses were different, and differently affected by the wind.

Leaving now this region of opinion and guesses, we refer to several *facts* established beyond question, which confirm the evidence of the Libellants upon this question, of the place of the collision.

First—

It is agreed both by the pilot and Emmons, the helmsman on the ship, *that at the moment of the collision the wheel had been hove hard up*, and Emmons says it was kept so.

Emmons, p. 12, int. 16.

The pilot says she had begun to pay off when they struck.

Williamson, p. 103, 65 cross.

She was going eight or nine knots an hour, and must have quickly obeyed her helm.

Hutchins, p. 71, 29 int.
Williamson, p. 102, 50 cross.

Second—

The ship after the collision went ahead and to leeward.

The evidence on this point will be found in

Johnson, p. 20, Int. 14, p. 21, Int. 29 and 32.
Schreuder, p. 26, Int. 4, p. 27, Int. 7, p. 28, Int. 28 and 29.
Walker, p. 31, Int. 5.
Pells, p. 38, Int. 27.
Hutchins, p. 69, Int. 7.
Childs, p. 79, Int. 23 and 24.

Quinn, (p. 74, int. 18,) Capt. of yacht, says they went ahead 30 rods or more, and to leeward; they sagged to leeward at same time, and brought up on opposite beach.

He was about 20 rods from them, and their progress was in a right angle with their direction from him, and so afforded him the best opportunity to see.

Lannin, p. 154, 24th int. They drifted ashore on Lovell's Island beach.

Burroughs and Jackaway both say she went to the lee shore.

Third—

The Marcellus's sails were thrown aback at the collision, and so the wind was pressing both vessels all the time, towards, and upon the lee shore.

Emmons, p. 13, int. 22.
Johnson, p. 20, int. 6.
Schreuder, p. 26, int. 4, and p. 29, int. 36.

Hutchins, p. 69, int. 7.
Norris, p. 114, 37 and 38 cross.
Cummiskey, p. 133, 48 cross.

But if she was right on the lee shore, *why were her sails hove aback at all?*

This fact is extremely important. The collision had already happened, and all the mischief was done. To throw her sails aback, if the ship was so near the lee shore as Claimants aver, was to throw her on to the beach, and that without occasion or reason. A steam tug was at hand to pull her off the schooner. Evidently, the truth is, the pilot thought he could back her off the schooner, and pass, even after the collision, to the leeward of the schooner.

Fourth—

It was some time before they were ashore, under all this pressure.

Jones, Claimants' witness, p. 117, 5 cross, says 5 to 8 minutes.

Jackaway, Claimants' witness, p. 141, int. 25, 2 minutes or thereabouts.

Capt. Quinn, p. 74, int. 19, says 7 minutes.

Burroughs, Claimants' witness, p. 147, 33 int., says between 4 and 5 minutes.

Cummiskey, Claimants' witness, says he was about one-fourth mile off at collision; he backed across channel, had difficulty in avoiding the coal schooner—run down to the vessels, and when he got to them, thinks not ashore. p. 130, 17, 19 and 20 cross.

Capt. Hutchins, p. 69, int. 7, says 8 to 10 minutes.

It is impossible that a ship with a *momentum of 9 knots, and helm hard up and paying off,* must not have brought up far sooner than all agree she did, if within 30 or 40 feet of the lee shore, especially as her sails were hove aback, and would operate as soon as her headway was lost to drift her ashore.

Fifth—

But another fact is more conclusive still.

The schooner sunk before the ship got clear of her, the ship's jib-boom having run under the schooner's mainstay.

When she sunk, she sunk stern on the beach and head towards the channel.

Three uncontradicted witnesses testify that from her stern to the shore was—

Edwards, p. 81, int. 3, says from 50 to 60 feet.
Littlefield, p. 85, int. 5 and 6, says 60 at least.
Littlefield, p. 89, 3, 5, 6 and 7 dir. res.
Hutchins, p. 72, 3 dir. res., says 65 feet about.
Johnson, p. 20, int. 11. Not more than short ship's length from shore.

The schooner was over eighty feet long. Littlefield, 85, int. 7, and was struck amidships, Hutchins, p. 70, int. 7, which would be forty feet from her stern.

Now if the schooner sunk exactly in the spot where she was struck, it is mathematically demonstrated that the ship's cutwater was *one hundred* feet from the lee shore.

But every witness in the case on both sides says that after the collision, they went to the leeward,—and consequently, whatever that leeward movement was, is to be added to the one hundred feet. It requires but fifty or seventy-five feet to confirm absolutely the evidence of the Libellants.

Now is this all;—a glance at the chart will show, that for a schooner to come down,—get round the point,—and turn round so as to present her *larboard* side to a ship forty feet from the lee shore, and receive the blow amidships, would have required wings as well as sails, *as some part* of the movement would necessarily *be on dry land.*

If the ship was one hundred feet from the shore, however, she was clearly in fault—for she was then bound to give way, and could have given way, and did not.

All the witnesses agree the water to be bold on the leeward side of the channel, and the pilot and Respondents' other witnesses, not only say *they could* but *did* actually go within *thirty* to *forty* feet of the shore—and the pilot says he laid his course to go within *forty feet, and this he did with a free choice and without reference to the schooner at all.*

Williamson, p. 92, int. 19.

POINT IV.

It is submitted that the evidence thus far considered establishes that the collision occurred, to say the least, so far from the lee shore, that the Marcellus could safely and easily have followed the established laws of navigation, and passed the schooner to leeward, and was bound to do so, giving way, if necessary, so as to pass her.

POINT V.

The ship did not give way, but on the contrary, as the vessels approached each other, the schooner going to windward as she ought, the mate of the ship hailed the schooner several times to "luff," when the helmsman of the ship, supposing the order to be for the ship, put her wheel down, or nearly so, and thereby caused *her* to *luff* about one and one-half points, and *by reason of the luff* struck the schooner, and *but for this luff*, would have safely passed the schooner to the leeward.

Thus far we have considered the evidence on the theory that the vessels so met, that the ship ought to, and should, have kept off, but neglected so to do, and thereby caused the collision.

But the Libellants allege not only neglect in not giving way, but actual fault in coming to, or luffing, and *that the luff caused the collision; and but for it there would have been no collision.* The evidence in support of *that proposition* seems conclusive.

The ship, before the collision, was running up free, with a fine breeze, all sail set, except studding sail, at the rate of about nine knots the hour, in perfectly smooth water, *and was therefore under the easiest and most complete control.*

Hutchins, p. 71, int. 29.
Williamson, p. 102, 50 cross.
Answer, p. 9.
And all agree as to this.

The Marcellus was a quick steering ship, and the way she was coming up, gave her the *best possible chance for steering.* She would mind a turn of three spokes of her wheel, as the wind and water then was. The wheel had eight spokes.

Johnson, p. 22, int. 42, 43, 44, 45 and 46.
Schreuder, p. 28, int. 25, 26, 27.

These two witnesses had been steering her every other watch for months.

See also the pilot Williamson, p. 103, 67 cross.

With the wind as she then had it, the ship was constantly tending to luff, and, to keep her to her course, the wheel must be, and was, *somewhat up.*

Williamson, p. 102, 57 and 58 cross.

The instant the helm was let loose, she would therefore begin *to luff;* and when, as the vessels were very near to each other, the ship in rapid motion, with her helm up to hold her to her course, the *wheel was suddenly rolled down, or nearly so,* a luff of the ship *must inevitably* have followed.

Emmons, (helmsman on the Marcellus,) p. 11, int. 4, p. 14, cross 1, and p. 18, 4th dir. res. "*I put the wheel down, or nearly so*"—three or four turns of the wheel, or from twenty-four to thirty-two spokes of the wheel.

Capt. Donnell, (passenger on Marcellus,) p. 47, int. 21, assisted in heaving down the wheel four or five spokes, he says, but the man at the wheel must have already got it partly down before Donnell, who was some feet distant, got hold of it.

The pilot, Williamson, p. 95, int. 62, p. 96, int. 69 and 70, admits that the wheel was let go, and flew amidships, but he is in conflict as to how much put down both with Emmons and Donnell, (Claimant's witnesses.)

Pilot says Capt. Donnell helped him *heave it up.*
Capt. Donnell says he helped the *man* (Emmons) *heave it down,* and left it when the pilot came to it.

Williamson, p. 95, int. 62, p. 96, int. 69, and 70.

It is apparent that there was confusion at the wheel at this moment, from the discrepant statements of these witnesses. And as Donnell and the pilot were at the wheel but a moment, it is evident that Emmons, the helmsman, who was there all the time and hold of the wheel, best knows *all* that was done.

Donnell, p. 47, int. 20, 21, 22, 23, and 24.

But it is shown *that that was done in the ship, which must have caused a luff,* by all three of these witnesses.

We now refer to the evidence that the *ship obeyed her helm and did luff* in point of fact.

Emmons (at helm, Marcellus) p. 12, int. 11, says she luffed one and a half points, as nigh as he could judge *by the light in range ahead of us;* and p. 17, 1 dir. re., in an important conversation with the pilot, when the pilot told him that the ship did not luff when the wheel was put down, he replied, that she must have luffed, and *he knew she did by the mark he had on the land.*

Johnson, (able seaman on the bow of the Marcellus,) p. 19, int. 5; p. 21, int. 23d, 27th, and 28th; and p. 23, int. 61st, says the ship luffed about one and a half points, *as he knew by the land ahead.*

Schreuder, (able seaman on board of Marcellus,) p. 26, int. 4, p. 27, int. 16 and 17, *saw by land ahead* that ship was luffing, going up to *windward,* and one and a half points.

Walker, (mate schooner,) p. 30, int. 3 and 4.
Pells, (seaman on schooner,) p. 37, int. 18, 19 and 23.
Mye, (seaman on schooner,) p. 39, int. 15.
Childs, (boy on schooner,) p. 78, int. 15 and 17.
Hutchins, (Capt. schooner,) p. 69, int. 7, and p. 70, int. 8, 9, 11.

Quinn, (Capt. yacht Young America, and standing on windward shore of Narrows, only 20 yards distant,) p. 74, int. 15, 16, 17; p. 76, cross-int. 13, 14 and 17, and p. 77, 5th dir. res., says he knows she luffed one and a half points.

Lannin, in the same position, p. 154; int. 18, 19, and 20, says she luffed as much as a point.

To this positive testimony of three experienced seamen from the ship, five from the schooner, and two from the shore, only 20 yards off, and all standing so as to see, there is opposed scarcely anything.

Donnell, (passenger and Capt. on the ship,) p. 48, int. 28 and 29, says ship did not luff, because wheel not down long enough—(mere opinion.)

Crowell, (1st mate Mareellus,) p. 55, int. 14, *did not perceive* that ship altered her course after passing Spit Light, until the collision.

But see p. 54, int. 11, and p. 56, int. 23, 24. He saw schooner three-quarters mile off, right ahead, bearing N. W. by W., going to windward, and when she passed steamer she luffed to pass, and then kept *off on same course.* This luff must have carried more to windward. She next luffed, he says, when length off. How does that bring her under the ship's bow? *By his statements* she must have been to the windward, and the collision as it took place, impossible without a luff in the ship.

Gage (boy on the Marcellus, Respondents' witness) not asked.

Lothrop, (boy on the Marcellus,) p. 63, 31 cross, p. 64, cross 34. Did not notice whether the ship came up into the wind before collision.

Wallace, (seaman on Marcellus,) p. 65, int. 10 and p. 66, 13 cross —Don't know whether ship altered her course, or whether she was *keeping off* or *luffing*, at time of collision.

Thompson (Stevedore's runner) says he was on schooner, near ship, and astern of her,) p. 106, int. 7—"Not as I know of," is all he says.

Norris, (second mate Marcellus,) p. 115, 51 cross—"*I do not know*" whether Marcellus changed her course or not, after first saw the schooner, and before collision. He is not asked by the Respondents in the examination in chief.

Jones, (carpenter on Marcellus,) p. 115, int. 7—She did not change her course *to my knowledge.*

Brown, (the man down buying grease,) p. 138, int. 13, says *she kept away.* (In which he is in conflict with all the witnesses on both sides, except the pilot.)

Jackaway, (mate of coal schooner, astern of Marcellus,) p. 140, int. 13—Not that *I see.* Yet his evidence *demonstrates* a *luff of the ship*, for he says he was on lee bow of his schooner. She was following the ship (p. 140, int. 5, 6, and 9) two lengths astern of Marcellus, and his *schooner heading might be a shade to windward* of the ship, and p. 142, 15, 16, and 17 cross—Luffed *to avoid ship* at the collision about one point, and *would not have avoided if he had not.*

This demonstrates a luff in the ship, as the coal schooner was heading about half a point to her windward, before collision, (Burroughs, p. 145, int. 7, 8, 9, 11,) and after collision, all agree the ship went to leeward. Why need the schooner luff, if the ship had not luffed? He says he did not see the ship luff; this is explained by the fact that he did not see the schooner till after collision, p. 140, int. 17. The luff had then taken place; nothing had caused him to notice it, but as soon as he did observe that a collision had taken place, he saw it had become necessary for him to luff to avoid the ship, and did luff a point, which added to the half point, (the coal schooner was previously heading to windward of the ship,) makes the amount of the ship's variation from her course precisely as given by Libellants' witnesses, to wit: about one and a half points.

Burroughs (captain of the coal schooner) says Marcellus did not luff, p. 146, int. 13. This is not reliable, because he was not noticing, see p. 148, 1, 2, and 3, cross; p. 149, 30 cross; p. 150, 33 cross; and p. 151, 49, 50 cross-int. From his 14 p. 146, it is plain he infers that if the Marcellus had luffed, he should have noticed it, as it would have brought her across his bows. This would be so, unless

his schooner luffed also. From his 51st cross, it appears that Burroughs thinks his schooner did not luff; but his mate Jackaway explains Burroughs's error by his statement, p. 142, 15, 16, and 17 cross, that Burroughs's schooner did luff to pass the Marcellus, which was unnecessary, unless the Marcellus had first luffed.

Lastly, we consider the evidence of the pilot, recollecting:

1st. That he is deeply interested.

2d. That at the time of the collision, and before, he was aft, and that the ship was 149 feet long, with a rising bow, [Littlefield, p. 85, int. 7, Norris, p. 112, 16, Cross,] and with all sail set, except a clew in the lee of the mainsail. That it was dusk. It was impossible for him to see, if disengaged, but it seems that just at the critical moment, when the mate cried luff, and the man at the wheel put it down, the pilot jumped on the house to see the schooner; saw at a glance the error, and jumped down to the wheel and stayed there till it was hove hard up, and then jumped back to the house on the *weather* side; [p. 102, Cross 54.] Her luff was taking place while he was reversing the wheel.

Emmons, the helmsman of ship, says, p. 13, int. 27, that it was not more than two seconds after they got the wheel up before they struck.

Pilot, p. 93, int. 38.—His account here of the matter agrees with Libellants' with only one exception—schooner luffed—but by a sort of cross questioning, from int. 39 to 59, in 20 questions, is drawn out something of the theory of the answer.

Page 103, 62 Cross.—When the mate went forward and said all right, the schooner was on our weather bow, heading for us, or a grain to windward of us.

Now from his 19 and 28 int. p. 92, and p. 97, 1st, 2d, 3d and 4th cross, (see chart,) it will appear that the schooner was much to his windward, and to have got to his leeward and been struck as she was, impossible, without passing over some part of the land.

Compare some other of his statements.

Page 93, int. 34.—The ship was not over 40 feet from lee shore.

Page 95, 59 int.—The helm was ported, and the ship began to fall off. How could this be, if within 30 or 40 feet of shore.

He says, p. 94, 38 and 54 int., that the schooner luffed.

Page 102, 52, 53 and 54 cross.—That he only knew by the schooner's jib being out across his bows.

This would follow a luff of the ship, and is equally explained by it.

He says, 48th int. p. 94, he ordered the mate forward to *hail the schooner, and tell her to luff.*

Emmons says, p. 11, int. 4.—The Pilot told the mate to "*go forward and see how that vessel is standing*, and let me know as soon as possible."

Crowell, p. 55, int. 16, (the mate and Respondents' witness,) says the pilot showed me the vessel coming down, and told me to "*go forward and see which side of the ship he intended to go.*"

Donnell, (Claimants' witness,) p. 47, int. 16, says the Pilot told mate to *step forward and see which way the schooner was going.*

And the Pilot himself in his 64 cross, p. 103, flatly contradicts the statement of answer to 48 int. in chief, p. 94, and in answer to the question, Did you tell the mate before he went forward, to tell the schooner to luff, says:

"No, sir. I told him to see what the schooner was doing."

Pilot, again, in 63 cross, p. 103, says the mate hailed him that schooner was keeping off, and he hailed mate to tell him to luff. It is very strange that the mate states nothing of this, nor any other witness, although the order was given, according to the pilot, from himself, at the stern, to the mate on the forecastle, about 150 feet distant.

Donnell, another of Claimants' witnesses, p. 47, int. 16, 17, 18, 20, states what took place, was right by the pilot, and states nothing of it.

But if the pilot was disposed to state the fact, his statement as to whether the ship luffed could have little weight, because he was not in a place where he could tell; he was aft; the sails of the ship intervened; he sent the mate forward to see for him; nor was he so disengaged at the time as to observe, even if he was in a place that enabled him so to do.

It is further evident from the way the vessels approached each other, that there was a luff of the ship.

Johnson, p. 21, int. 13, and p. 25, 27 cross.
Schreuder, p. 27, int. 10, and p. 29, 4 cross.
Hutchins, p. 69, int. 7.
Walker, p. 33, 25 and 26 cross.
Childs, p. 78, int. 12.
H. M. Quinn, p. 43, int. 15.
Crowell, p. 54, int. 11, and p. 57, 7 cross.
Crocker, p. 50, int. 8 and 9.
Lothrop, p. 60, int. 10 and 12.
Wallace, p. 64, int. 6.
Norris, p. 110, int. 14, 15 and 17, and p. 114, 44 cross.
Jones, p. 116, int. 11 and 15, and p. 117, 4 cross.
Humphreys, p. 119, int. 25.
Cummiskey, p. 126, int. 9, and p. 128, int. 21 and 24.
Burroughs, p. 146, int. 19 and 20, and p. 148, 2 and 3 cross.
Williamson, p. 92, int. 26 and 27, p. 93, int. 37, p. 98, 14 cross, and p. 99, 27 cross.
Jackaway, p. 140, int. 8.

That *there was this luff of the ship,* and *that it alone caused the collision,* appears from the evidence from both sides, and from almost every witness in the case, because, before the hail of the mate to luff, which caused the error at the ship's wheel, nobody saw danger, and, as soon after as a ship could mind her helm, all saw that escape from collision was impossible.

Johnson, p. 23, int. 52, 53.
Schreuder, p. 28, int. ~~31~~, 32. + 33
Walker, p. 32, int. 17, 18.
Pells, p. 37, int. 21, 22.
Mye, p. 40, int. 16, 17.
Hutchins, p. 70, int. 11, 12, and p. 73, 5 ch. re.
Capt. Quinn, p. 74, int. 21.
Childs, p. 79, int. 19.
Lannin, p. 154, int. 22.

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We have cited 16 witnesses from both sides, and all or about all who saw the schooner before the collision; and all agree that suddenly, just before the collision, *and after the mate's call to luff,* when the vessels were only a very short distance apart, they perceived that from a condition of safety, they were in one of danger.

We now refer to the statement of Respondents' witnesses upon the same question.

They agree, that until a sudden change of the relative positions of the ship and schooner by reason of which the schooner appeared to them across the ship's bows, (which they suppose was caused by a luff in the schooner,) they did not suppose there would be a collision. A luff in the ship would produce just this appearance to them.

Crowell, p. 55, int. 16, and p. 58, 9 cross.
Lothrop, p. 62, int. 19, 20 and 21; p. 63, 27 cross; p. 63, 4 re., and p. 64, 35 cross.
H. M. Quinn, p. 43, int. 18. It was after hail of mate.
Donnell, p. 47, int. 17, 20, 21 and 25.
Norris, p. 113, 20 and 21 cross.
Williamson, p. 102, 59 cross.

If it be true, as the claimants aver, that before the mate's call to luff, the schooner was standing down to leeward of the ship, and the ship but 30 or 40 feet from the shore, then a collision was as obvious before as after the hail. And unless the schooner was so standing down to leeward, and was already to leeward of the ship, it is perfectly evident that a luff of the schooner would not bring her across the ship's bows.

The Claimants endeavor to show that this change in the position of the vessels was caused by a luff of the schooner.

The evidence has been referred to on this subject somewhat, already, in connection with the proposition that the schooner was close hauled. Ante, p. 3.

Walker, p. 30, int. 3; p. 32, int. 19, 21, and 22; p. 33, 19 cross; p. 35, 47, 48, 51, 52 and 53 cross.
Hutchins, p. 69, int. 7; p. 71, int. 19, 20 and 22.
Pells, p. 36, int. 5 and 6.
Mye, p. 39, int. 4 and 5.
Childs, p. 78, int. 8; p. 79, int. 20.
Capt. Quinn, p. 73, 7, 8; p. 74, int. 20, and p. 75, 2, 3, 4, 5, 6, 9, and 12 cross.
Schreuder, p. 26, int. 4.

Of the witnesses called by Claimants,

H. M. Quinn, p. 43, int. 18, reply from schooner was, that her helm is hard down.
Donnell, p. 48, int. 27; but see p. 47, int. 25. Did not see schooner till collision.
Crocker, p. 51, int. 15, saw no luff of schooner, but says she kept off.
Crowell has already been referred to, p. 22.
Gage did not see schooner before collision.

Lothrop, (boy), p. 60, int. 13, says she luffed, p. 63, 27 cross. He was looking at schooner, and therefore could not tell which ship changed her position.

Wallace says schooner luffed, p. 65, int. 8; but see p. 66, cross 13, from which it is evident, without looking at some fixed object, that he could not tell.

Williamson, pilot, already referred to, p. 24.
Thompson undertakes to say schooner luffed; p. 107, int. 21.

This is the witness employed in getting jobs for stevedores, before referred to, who says he was on board of a coal schooner, but neither the Captain nor mate recollect his being there, and both of them say that the schooner was not visible from their schooner where Thompson says he was.

See ante, p. 9.

Norris thinks she luffed a little.

P. 111, int. 18. See p. 112, 8, and 18 cross.

His opinion is of the slightest value.

Jones, p. 116, int. 15, says she did not change her course as he knows of.

The other of Respondents' witnesses did not see her till collision, and some say that she luffed because she was then across the bows of the ship, but that fact is explained by the luff of the ship, which they had not noticed.

There *would have been no collision if the ship had kept her course.* This is the expressly stated judgment of two able seamen on the Marcellus—of the Captain, Mate, and two men on the schooner, and of the Captain and man of the yacht Young America.

Johnson, p. 21, int. 33 and 34.
Schreuder, p. 27, int. 19.
Walker, p. 32, int. 24, p. 35, 52 cross.
Pells, p. 37, int. 26.
Mye, p. 40, int. 18, and 11 cross, on p. 41.
Hutchins, p. 70, int. 12.
Capt. Quinn, p. 77, int. 6, dir. re.
Lannin, p. 154, int. 19.

This proposition is also sustained by the evidence cited to the proposition that no danger of collision was apprehended till the mate's hail to luff, which caused the error and collision.

The Captain of the Marcellus and the pilot, both attributed the collision at the time to the error of the mate, in ordering luff.

Johnson, p. 22, int. 37.
Schreuder, p. 28, int. 22.
Emmons, p. 13, int. 28 and p. 14, int. 29.

This error as to the wheel is apparent.

Williamson, (the pilot of Marcellus,) p. 100, int. 39 cross.

Emmons, p. 14, 1 cross, and all who speak on the subject, cited to the proposition that the wheel of the ship was hove down or nearly so. Ante, p. 20.

Several facts tending to show how the vessels approached each other, are very significant, and strongly support the allegations of the Libellants.

1st. The mate, when sent forward, ran forward on the *weather* side of the ship: he would naturally run forward on the side where he could see the schooner.

Jones, p. 117, 2 cross.

2d. The Captain of the Marcellus, when the mate was sent forward to look out, went off the poop round on the port side, which was the weather side.

Emmons, p. 13, int. 26.

3d. When the pilot came to the wheel to correct the error there, he came *from the weather side of the deck;* he would naturally, when he saw danger of approaching vessels, go to the side he could see her from. On the *lee side* he had *lee* clew up, to enable him to see well—Ans. p. 9—yet he went to the weather side.

Donnell, p. 49, cross int. 5.

4th. The pilot, after he had corrected the error at the wheel when he got up to see the schooner, got on the *weather* side of the house of the ship.

Williamson, p. 102, 54 cross.

5th. Brown, the man whose boat was hitched to the fore part of the main chains on the lee side of the ship, did not see the schooner till after the collision.

Brown, p. 139, int. 17.

6th. Capt. Hutchins of the schooner, during all the time the vessels were approaching and hailing, was standing at the *lee* fore rigging of the schooner.

Hutchins, p. 69, int. 7.

If it be that Burroughs and Jackaway in the coal schooner in rear of ship did not see the schooner, it weighs nothing against these circumstances—they were nearly astern of the ship and she had all sail set, and her yards extended thirty feet to the windward of her.

Jackaway, p. 144, 4 dir. res.

7th. The mate of the Marcellus hailed the schooner to luff. If she was to leeward, that was to invite her to an instant destruction. The captain of the schooner hailed ship to keep off, which, if he was to leeward of her, was to invite her to run directly into the schooner.

All these circumstances tend most strongly to confirm the allegations of the Libellants.

It is at least doubtful whether the schooner was seasonably seen from the ship. There is no evidence that there was any regular

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lookout then being kept. The pilot first called attention to her, who was aft, and near the wheel. The mate *ran* forward *instantly*, he says, on the order. The men say the mate came "jumping forward," and Capt. Donnell says the mate jumped forward. It is doubtful if any of the men had before observed the schooner approaching, and it is certain from all the accounts that the collision took place very shortly after the mate went forward.

It is, however, hardly worth the while to ask the attention of the Court to the scattered evidence on these points beyond a general reference.

The error at the wheel was clearly attributable to the fault of the mate, and not the pilot, upon the evidence.

Schreuder, p. 26, int. 4.
Quinn, p. 43, int. 18.
Crowell, (the mate himself,) p. 55, int. 16.
Williamson, p. 100, 39 cross.

The pilot was then aft, and in his proper place, for aught that appears, and where, owing to the sails and rising bow of the ship, he had not a full view of the schooner, or her position, and he called upon the mate to ascertain.

The mate gave an order, but so carelessly that it was not understood aboard the ship, but as he had no duty to give orders to the schooner, the man steering and the pilot might well suppose it was for the ship. If the pilot did adopt the order, by repeating it to the man at the helm, it was not with deliberation, or as the result of his own judgment, but in an apparent emergency, where and when he had not the means of forming a judgment, and he was obliged to rely upon the mate.

But upon the evidence in this cause, the pilot did not adopt the order, but the man at the wheel did it without his order.

Emmons, the steersman, is the only man who says the pilot repeated the order.

Emmons, p. 11, int. 4, and p. 12, int. 14 and 15.

This man, who was steering the Marcellus, has of course a desire not to appear to have acted without orders from the pilot.

Captain Donnell, in his account of the matter, does not say the pilot repeated the order, but the contrary.

Donnell, p. 47, int. 16, 17, 18, 20, 21.

When Donnell jumped to the wheel, the pilot says—"No, no."

Williamson, the pilot, most positively denies that the order was repeated by him.

See Appendix, A.

Williamson, p. 95, int. 62, and p. 96, int. 69 and 70, and p. 100, cross 39 and 41.

The general proposition of the Claimants is, that two vessels, one leaving and one entering the harbor, and both having a *free wind*, and a perfect choice of way, *both chose*, just at dusk, to run within 30 or 40 feet of a lee shore, leaving a clear channel of 300 feet to windward.

There was no occasion for either to do this, and the thing in itself is highly improbable.

The general proposition of the Libellants is, that the ship was coming up free, and taking naturally the best water, about the centre of the channel. That the schooner, not having so favorable wind, was, after rounding Nix's Mate, making the best of the wind, to fetch out through the Narrows, and that the natural, and only sensible or prudent course, under these circumstances, was to keep as far as possible to the windward, and that in fact she was to windward of the centre of the channel. They were coming not far from each other. The mate of the ship, seeing they were not coming far apart, and perhaps supposing the schooner was a point or two free, and would bear up for the larger vessel, hailed her to luff. This, the schooner being close on the wind, could not do, but the ship would probably not have hit her if, unfortunately, the man at the wheel, at this most critical moment, had not mistaken the mate's hail and put her wheel down, and so thrust the ship from her course directly upon the schooner.

THOMAS H. RUSSELL,

For Libellants.

APPENDIX.

A Motion to amend their Answer was filed in the Circuit Court by the Claimants; but not urged at the hearing. The learned Judge, however, in deciding the cause, considered the question.—Should the proposition be urged in this Court, the Libellants submit the following

BRIEF,

IN REPLY TO THE PROPOSED AMENDMENT, AVERRING THAT THE SHIP IS NOT LIABLE, BECAUSE SHE HAD A PILOT ON BOARD.

IT is now objected, by a proposed amendment, that the ship is not liable, because, at the time of the collision, she was in charge of a Pilot, and the fault was his.

This point was not made in the original answer, drawn under the direction of both counsel; and this shows that eminent legal authority did not think it worth taking.

The answer to this is, that the proposition cannot be sustained as matter of law or fact.

In England, the Pilot is made liable by statute, and the owners are exempt where the fault is solely and exclusively his.

Here there is no such law.

The proposition is, that where a Pilot is on board, and a collision occurs while the ship is under his direction, that not only the owners are exempt, but that no suit can be maintained *in rem* vs. *ship*.

That the Pilot is licensed and established by statute;—that the ship is obliged to take him, or pay his fees; and therefore the taking is compulsory; and the ship ought to be exempt.

See Laws of Pilotage.

Mass. Rev. Stat. ch. 32, sec. 7, 12, 24.

I. These do not and are not intended to establish compulsory pilotage.

They are merely to sustain the pilotage establishment, in the nature of tolls, for the benefit of navigation; but leave it wholly optional with vessels whether they will have the service or not.

They do not levy a penalty, but merely a tax, or toll.

It will be observed—First, that here is an *entire and free option with the ship* whether to take a Pilot or not.

Other vessels meeting or sailing with such ship, have no such option whether that ship shall take a pilot.

To say, then, that the Pilot who, to some extent, is selected by the ship, sails her at the risk of other vessels, and not her own, is quite inequitable.

It has been already decided, in this Circuit, that where a vessel is going out of the harbor, and may select a Pilot, she is responsible.

The Carolus, 2 Curtis, 69.

Here there is the same right of selection, paying only the contribution to the pilotage service.

No distinction is made in statute as to vessels going in or out.

Rev. Stat., ch. 32, sec. 12.

The pilotage fees are not a penalty to prohibit, but a contribution to support the system, like hospital money.

They differ wholly from English acts, where there is a penalty, and an exemption of owners.

The statute does not prohibit the master, but expressly authorizes him to pilot his own vessel, *in or out.*

Rev. Stat., ch. 32, sec. 12.

So are the decisions.

Yates *vs.* Brown, 8 Pick. 22.

This case not put on distinction of vessel going out or in.

Story's Agency, sec. 456 a, note.

Smith *vs.* the Creole, 2 Wallace, 485. See pp. 486, 487, 512.

Williamson *vs.* Pierce, 16 Morton, 399.
Fletcher *vs.* Bruddick, 5 Bos. & Pul. 182.
Bussy *vs.* Donaldson, 4 Dal. 206.

Such was the construction of the law in England, until the Pilot Act, 52 Geo. 3, and its revisions expressly provided.

The Neptune, 1 Dod., 467.
Smith *vs.* Creole, 2 Wal., 517, 520.
(The Protector, 1 Wm. Rob., 48 and 49, 54.)

The suggestion that a distinction may be made between a vessel going out, and one coming in, The Carolus, 2 Curt. 69, is a *dictum* upon a point not before the Court, and cannot be sustained by the Statute of Massachusetts.

Rev. Stat. ch. 32, sec. 12.

It is also against the whole warrant, principles and reasonings of the authorities, as is said by Mr. Parsons.

1 Par. Mar. Law, 487, note.

In England, where the Statute expressly provides that "No owner or master, &c., shall be answerable for any loss or damage to any person by any default, neglect, &c., of any licensed Pilot, acting in charge of any ship, &c.," it is held that to exempt the ship-owners, the fault must have been exclusively that of the Pilot.

The Diana, 1 W. Rob. 131.
The Lochlibo, 3 W. Rob. 310, 1 Eng. L. & Eq., 651.

The first answer to their proposed amendment is that the proposition of law on which it rests cannot be sustained.

(2) We answer, it is not true as a proposition of facts.

If the collision had arisen solely by the omission of the Marcellus to put away, the fault might have been that of the Pilot.

But it is submitted that if the Pilot omitted to put away in time because the mate told him "it was all right, the schooner was going to the windward," or because the mate so called out to

luff that he mistook it, or even adopted it without reflection, then the fault is not exclusively the Pilot's.

The Lochlibo, 3 W. Rob, 310, 1 Eng. L. and Eq. 651.

But this is far from the whole statement. The collision was caused by the ship's luffing up into the schooner, and the order which caused this and accomplished all, the respondents' witnesses and the Pilot most emphatically say, did not emanate from him.

If it had been adopted by him relying on the mate, and with no means of judging of its propriety, the legal result would be the same.

Circuit Court of the United States.

MASSACHUSETTS DISTRICT.

OCTOBER TERM, 1860.

ADMIRALTY.

HUGH N. CAMP AND AL., LIBELLANTS,

vs.

SHIP MARCELLUS, JOHN A. BAXTER AND AL., CLAIMANTS AND APPELLANTS.

OPINION OF MR. JUSTICE CLIFFORD.

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Circuit Court of the United States.

MASSACHUSETTS DISTRICT.

ADMIRALTY. OCTOBER TERM, 1860.

HUGH N. CAMP ET AL., LIBELLANTS,

vs.

THE SHIP MARCELLUS, JOHN A. BAXTER ET ALS., CLAIMANTS, AND APPELLANTS FROM THE DISTRICT COURT.

OPINION.

CLIFFORD, J. This is an appeal in admiralty in a cause of contract, civil and maritime. The libellants allege that the ship Marcellus, on the 27th day of September, 1859, at about seven o'clock in the evening, while the schooner Empire, laden with sugar, was sailing through the Narrows in Boston harbor, between Lovell's and Gallup's Islands, ran with great force and violence afoul of the schooner, striking her on the larboard side a little aft of amidships, greatly injuring and damaging her, and causing her to sink, so that the sugar, which was the property of the libellants, was totally lost and destroyed. At the time of the disaster, the schooner was on a voyage from Boston to Bristol, in the State of Rhode Island, and the ship, as the libellants allege, was sailing into the port from which the schooner had just departed, on her return voyage from Singapore.

They seek to recover in this suit, upon the ground that the collision was occasioned through the carelessness and negligence of those in charge of the ship. As the foundation of the charge, they allege in effect that the wind, just before and at the time of the

collision, was south-south-west; that the schooner was sailing on the western side of the channel close-hauled on the wind, with her starboard tacks aboard, and with all or nearly all her sails set, that she was steering south-east by south, working up to the wind, in order to give the ship as much room as possible; that the ship was sailing up the channel at great speed and with the wind free, so that she might have passed the schooner on the larboard side without difficulty; that as the ship approached towards the point of danger, the schooner hailed her to keep off; that the hail was answered from the ship, requiring the schooner to luff, which was impossible, as she was already close to the wind; that the schooner did not change her course, but that the ship, immediately after she hailed the schooner, luffed and instantly ran into the schooner, and presently both vessels drifted to the leeward shore.

In their answer, the respondents admit that the collision occurred at the time specified in the libel, and that the ship was running free on her larboard tack, but allege that the collision took place on the easterly side of the channel, and that every possible precaution was taken by the ship, by hailing and otherwise, to prevent the vessels from coming in contact. Their theory is, that it was occasioned entirely through the fault and mismanagement of those in charge of the schooner, and accordingly allege that the wind at the time of the collision was south-west, that the ship between six and seven o'clock was sailing along the leeward edge of the channel, hugging the shore as close as it was possible for her to do with safety; that while so passing, the schooner was discovered some distance ahead, coming down the harbor with a free wind, and appearing at first to be going to the windward of the ship, as she should and might easily have done, but that she afterwards changed her course, as if going to the leeward, and when she had approached within a short distance of the ship, luffed across her bows, resulting in a violent collision, sinking the schooner and damaging the hull, rigging and spars of the ship, for which they pray they may be allowed.

Such is the substance of the pleadings, so far as it is necessary to refer to them in determining the merits of the controversy. All of the questions presented for decision on this branch of the case are questions of fact, to be determined from the evidence. Witnesses were examined on both sides in the District Court, and after a full hearing, a decree was entered in favor of the libellants. Whereupon the respondents appealed to this Court. Much additional

testimony has since been taken, but it is not of a character to relieve the cause from the embarrassment which surrounded it in the Court below, arising from the conflicting statements of the witnesses. Some of the circumstances, however, preceding the collision, are placed beyond the reach of doubt; and as they will aid in the solution of others more complicated by such conflicting statements, attention will first be given to such as substantially run clear of that difficulty.

According to the testimony of the master of the schooner, after she passed Nix's Mate, so called, "he luffed too, hauled the sheets flat aft and filled away." He states positively that he then looked at the compass, and that the schooner at that time headed south-east by south. All the witnesses who have any experience upon the subject, and whose opinions are worth considering, agree, that what he says he did, is precisely what he ought to have done in that situation. Assuming that his statement is reliable, then the schooner at that time and place was heading in a right direction to conform to the usages of the navigation, as appears by the concurrent testimony of every experienced witness in the case. Vessels going down the harbor, whether the wind is south-west or south-south-west, usually take the windward side of the channel in passing through the Narrows, and those coming up, as a general rule, are expected to take the leeward side under the same circumstances. As the schooner rounded the point, and before she was put upon the new course, she ran as near the land, according to the testimony of the mate, as the wind would allow her to do; and both the master and the mate testify that when she was put upon the course of south-east by south, she had the wind south-south-west, and was sailing as close to the wind as she would lay and fill her sails.

Considerable discrepancy exists in the testimony as to the course of the wind. Several witnesses examined by the respondents testify, some positively and others with more or less qualification, that the wind was south-west. Others admit that it was south-south-west a short time previous to the collision, but professed to think that it had changed before the collision occurred, which needs confirmation. Looking at the whole evidence, the better opinion is in favor of the theory assumed by the libellants.

None of the other facts embraced in this statement appear to be seriously controverted, except that one witness examined by the respondent says, if the wind and course of the vessel were such as

stated by the master, and the schooner had been kept up to the wind during the passage down, she would have come in contact with the land on the windward shore. But that would depend so much upon the distance she was to the leeward when the course was taken, and upon the imperfectly ascertained fact how near she would lay to the wind, that the mere opinion of a single witness is not entitled to much weight. If she would not lay within less than six points, then it is believed that no such consequence would have followed, whether the wind was south-west, or south-south-west; and even if she could be made to lay within five points, which is pretty close for an ordinary schooner, still it is scarcely probable that she was held constantly up to her utmost capability in that behalf.

Besides, it is insisted by the respondents that the true course of the schooner through the Narrows was south-east by south, which is the exact course on which she was put by the master. Men of intelligence do not ordinarily depart from a known regulation, calculated to promote their own safety, without some motive of interest or convenience. Beyond doubt the master was well acquainted with the navigation, having sailed through the Narrows, as the channel is called, sixteen times a year, on an average, for twenty-one years. Day-light was not entirely gone, when he set the course of the vessel, and he had good weather and only a fresh breeze as the vessel advanced under that course. Nothing short of willful default, therefore, could have prevented him from putting the vessel on the usual course, as it was his duty to do. No one is able to assign any reason why he did not perform his duty, and in point of fact there is not the slightest ground to impeach either his veracity, or the accuracy of his statement on this point.

It is not denied by the respondents that the schooner, when she was first seen by those on board the ship, appeared to be going to the windward of their vessel, but their theory is that she afterwards changed her course, as if going to the leeward of the ship, and when she had approached within a short distance luffed across her bows. Such is the theory expressly set up in the answer, and in effect it is the theory attempted to be sustained by the proofs. Take for example, the testimony of the pilot. He was asked how the schooner was going when he first saw her, and to that question he replied that she appeared to be going to the windward of the ship. That theory admits that the schooner, when first discerned

was sailing in the right direction, and clearly implies that her course was twice changed afterwards, before the collision took place. True it is that the pilot says, in another part of his testimony, that she did not come on to the regular course when she rounded the point, but that statement finds little support in the evidence and is believed to be incorrect. According to his own account, the schooner was then a mile distant, and when directly asked how far she was from the ship when she fell off, he says perhaps it might have been a quarter of a mile, showing conclusively that he did not properly discriminate as to time and place in his former answer. Other witnesses examined by the respondents testify, that they first saw the schooner one point on the lee bow of the ship, and that she came down the channel in a very irregular and varying course. Many of them also testify that just before she approached the ship, she luffed across her bows as alleged in the answer.

To support that theory the respondents assume that the course of the schooner was twice changed in going down the channel, that she first fell off close to the leeward shore, and then almost at the instant of collision luffed across the bows of the ship, and a large number of witnesses are examined by them who testify to that effect. None of their witnesses, however, were on board the schooner, and those last referred to, are speaking of events which they suppose to have occurred at the very moment the two vessels came in contact, when it clearly appears that there was much confusion on board the ship.

Witnesses were also examined by the libellants, and among the number are the mate of the schooner who was at the wheel, and the master who commanded her deck. They testify without qualification, that the schooner throughout the passage down the Narrows was kept close to the wind, and affirm in the most positive terms, that she was not suffered to fall off, and did not luff at all. Both the master and the mate know what their own acts were, and unless their statements are correct they must have willfully perverted the truth. Those examined by the respondents may be in error, and yet may not have stated what they do not believe to be true. Twilight was already waning before the vessels came in contact, and the witnesses for the respondents may have inferred that the schooner luffed, from the fact that her helmsman actually crowded her into the wind at the moment of the collision with a view to escape if possible the consequence of the sudden and unexpected change made by the ship.

All experience shows where there is, as in this case, a great disparity in the size, power and speed of vessels approaching from opposite directions, that those in charge of the smaller of the two are very apt, as the danger of the collision becomes imminent, to attempt through fright or otherwise to make some change in the course of the vessel, hoping, oftentimes vainly, either to shift the blow to some less dangerous part of the vessel, or to escape its consequences altogether. Prompted as such efforts usually are by good motives and the instincts of self-preservation, they are not in general regarded as faults, and certainly not when it appears that the act was superinduced by the primary fault of the other vessel.

New York and Liverpool Mail Steamship Co. *vs.* Rumball, 21 How. 383.

Ten of the witnesses examined by the respondents, including a passenger, belong to the ship, three were on board a steam tug which had just gone up past both vessels, and four were on other vessels not very distant from the place of collision. Most of them represent more or less positively that the ship just before and at the time of the disaster was sailing within from thirty to fifty feet of the lee shore, or at all events about as near as she could sail with safety. They all agree, however, that vessels of the largest size can sail very close to that shore, and nothing can be more satisfactorily proved than is the fact that the force of the collision was such that the two vessels became so entangled together that it required some ten or fifteen minutes to separate them, and that during a considerable portion of that time, both vessels were drifting to the leeward.

The reason why they so drifted is apparent from the undisputed facts of the case. Immediately after the collision, the crew of the ship hove back the main yard and mizzen top-sail ; and in point of fact commenced without delay to take in or shorten all the sails. After the collision, the steam-tug, at the hail of the mate of the ship, returned for the purpose of towing the ship clear of the wreck. With that view she at first fastened a hawser to the schooner, and endeavored to pull her masts clear, but finding that the object could not be effected in that way, she got a hawser out astern of the ship, and towed the ship stern foremost clear of the schooner. During a considerable portion of this time the two vessels were drifting to the leeward, and it may be that the witnesses of the respondents

mistake the place of collision for the place where the two vessels were when the ship was relieved, overlooking the fact that they had previously drifted to the leeward shore. Assistance had been offered to the ship by the steam tug, before she entered the Narrows, but the offer had been refused by the ship, because she had a good leading breeze. Prior to the collision, the steamer had gone up past the ship on the windward side of the channel, and had also gone past the schooner on the leeward side.

Three of the crew of the ship were also examined by the libellants. Of these, one was the helmsman, and his testimony is of great importance in the case. He went to the wheel at six o'clock, and was in charge of it when the collision occurred. Just before it took place, the pilot, the master, a passenger, who was also a master mariner, and the mate, were all standing on the quarter deck conversing. Presently the pilot stepped under the lee of the spanker on the starboard side of the ship, and saw a vessel ahead under the lee of the ship. Instantly he called to the mate and directed him to go forward and see how the vessel was standing. Pursuant to the order, the mate went forward, and perceiving that she was heading to the windward of the ship, he responded to the order, "All right, she's going to windward," but in a short time was heard to say, "Luff, hard down, hard down, luff," which were the first words heard by the man at the wheel. As soon as the wheelsman heard those words, the pilot, as he says, repeated the words "hard down, luff;" and the witness testifies positively that he put the wheel down or nearly so. Before he could get it quite down, however, the pilot directed him to put it hard up, and jumped from the house and helped him execute the order, but the ship came in collision with the schooner before the change of the wheel from hard down to hard up had any effect upon the course of the ship. She was a large vessel of some fifteen hundred tons burthen, and was sailing about eight miles an hour, while the schooner measured only about one hundred and twenty-nine tons, and was not sailing more than three or four knots an hour. When the wheelsman was asked how far he put the wheel down, under the first order, and whether it had the effect to change the course of the ship, he answered that he put it nearly down, and that it changed the course a point and a half, as near as he could judge by the light in the range ahead.

Since the commencement of the suit the pilot has had an inter-

view with the witness, and endeavored to convince him that the ship did not luff when he put the wheel down. His response to the suggestions of the pilot is one of some significance in this connection. He told the pilot the ship must have luffed, and he knew she did by the mark he had on the land.

Another of the seamen belonging to the ship, and one of those examined by the libellants, strongly confirms the statements of this witness in several essential particulars. When the mate was sent forward, the witness was in the forecastle of the ship, and heard what the mate said. According to his account, the mate very soon sung out to the schooner to luff, and the master replied that he could not; but the mate hailoed a second time, saying, "You must luff; heave her hard down." While this colloquy was going on between the mate of the ship and the master of the schooner, the witness says the ship luffed, and he accounts for it on the ground that the pilot made a mistake; that he understood the mate as speaking to those in charge of the ship, instead of those in charge of the schooner.

Without an exception, every one of those in charge of the schooner testify in the most positive terms that her course was not changed from the moment it was taken for the purpose of passing through the Narrows till the collision occurred; and the answer of the master to the hail of the mate of the ship goes very far to show that she was close on the wind at that time. Directions were given by him to the wheelsman, before he went forward, to hold her up close, and when he was hailed by the mate of the ship to luff, his answer was that he could not, and doubtless for the reason that she was already as close to the wind as she would lay. Numerous witnesses examined by the respondents affirm that the ship did not luff, but not one of them denies that this mistake was made by the wheelsman. Remarks made at the time, both by the master and the pilot, indicate very strongly that they were then of the opinion that the collision was justly ascribable to the indiscretion of the mate, and to the blunder which he occasioned. By the former it was said that the mate "bothered" the pilot, and by the latter that it would have been better if the mate had staid aft where he was.

Without entering more into detail, I am of the opinion, upon the whole evidence, that the schooner did not change her course, as alleged in the answer, but that the collision was occasioned by the mistake on board the ship.

1223

Since the appeal, the respondents have filed an amendment to their answer, which they ask to have allowed. They propose to add, in effect, that the ship at the time of the collision was under the entire control and management of a legally authorized pilot, who by law had a right to the charge of the ship, and who alone is responsible for any damages arising from any fault in her navigation.

Suppose the amendment to be allowed, and to be a part of the answer, and the proposition to be assumed as stated in the proposed amendment. Two replies may be given to the proposition, either of which is decisive against it.

1. No proper view of the evidence will justify the conclusion that the mistake which caused the collision was solely attributable to the pilot; on the contrary, even if it be admitted that the pilot repeated the words which led to the error, still it was not an order deliberately and understandingly given, but was clearly superinduced by the rashness and indiscretion of the mate. Whatever error, therefore, was committed, was not in fact caused by any negligence or unskillfulness on the part of the pilot, but by the officious and unauthorized interference of the first officer of the ship. It was so understood by the master, when he reproved the mate for having "bothered" the pilot, and by the pilot who at the moment remarked that it would have been better if the mate had staid aft, where he was before he was sent forward to see how the schooner was standing. But the pilot denies that he repeated the order, and the wheelsman is not supported in that particular by any other witness who had any knowledge upon the subject. That the mistake was caused by the mate there can be no doubt, but it was actually made by the wheelsman. When he heard the hail of the mate, he mistook it for an order directed to himself, and put the wheel down, so that it not only does not appear that the fault was attributable solely to the pilot, but the evidence clearly shows that the collision was occasioned through the fault of those belonging to the ship.

Owners are declared by statute in England not to be liable for any loss or damage by reason of any neglect, default, incompetency, or incapacity of any licensed pilot in charge of the vessel. Under that statute, it was formerly held if there was neglect in the navigation of the vessel, and there was a pilot on board, the neglect was, *prima facie*, attributable to the pilot. But the rule is now well

established that the burden is on the owners to show, in order to bring their case within the provisions of the statute, that the pilot was alone in fault.

The Protector, 1 Wm. Rob. 45.
The Diana, 1 Wm. Rob. 131.
The Ripon, 6 Notes Cas. 245.
The Christiana, 7 Notes Cas. 2.
Steuart *vs.* Ismonger, 4 Moore, P. C. 11.
Hammond *vs.* Rogers, 7 Moore, P. C. 160.
The Batavier, 40 Eng. L. and E. 19.
The Mobile, 20 Law Rep. 172.

2. Vessels are not positively bound in any case, by the law of this State, to employ a pilot, whether going in or coming out of a harbor; but when inward bound, and a pilot seasonably offers his services and is ready to enter upon the duty, the ship must pay pilotage fees, even if his services are refused. While on board, the pilot, in the absence of the master, has the exclusive control and direction of the navigation of the vessel; but if the master is present, the power of the pilot does not so far supersede the authority of the master that the latter may not, in case of obvious and certain disability, or gross ignorance and palpable and imminently dangerous mistake, disobey his orders and interfere for the protection of the ship and the lives of those on board. Divided authority in a ship with reference to the same subject matter is certainly not to be encouraged, and can never be justified or tolerated except in cases of urgent and extreme necessity. While standing by and witnessing a self-evident mistake manifestly and imminently endangering the ship, and certain to cause a collision, he should not remain silent, but might well interpose, so far at least as to point out the error, and suggest the proper corrective. Had there been less conversation on the house or quarter-deck of the ship, among the master mariners there assembled, just before the schooner was discerned, and more attention given to the duties of a look-out, it is believed there would have been much less occasion for haste in sending the mate forward, and greatly less confusion on board the vessel in the moment of danger. Ship-owners, it is true, are held not liable by statute in some jurisdictions, when the ship is under the charge of a pilot; but the circumstances of this case are such, that the application of the rule in this controversy, even if it can be

acknowledged at all under our jurisprudence, would be most unjust and inequitable.

Prior to the statute in England, Sir William Scott held, in the case of the Neptune, 1 Dod. 467, that parties who suffer by a collision are entitled to have their remedy against the vessel occasioning the damage, and are not under the necessity of looking to the pilot, from whom redress is not always to be had for compensation. It cannot be maintained, said that learned Judge, that the circumstance of having a pilot on board, and acting in conformity to his direction, can operate as a discharge of the responsibility of the owner; and such is believed to be the true exposition of the maritime law, independently of any statutory regulation upon the subject. Ships sailing to and from certain ports in England are obliged by law to receive a pilot, and it is upon the ground that the relation of principal and agent does not exist in such cases, between the owners and the pilot, that her courts have held that his presence and control discharges the owner from all responsibility, in case the accident happens entirely through his fault. But it is not correct to suppose that the master, in this State, even of an inward bound ship, is compelled to accept the services of a pilot. Notwithstanding a pilot may seasonably offer his services, still the master may decline them and continue to navigate his vessel; but in that event he must pay the legal fees of the pilot.

Martin *vs.* Hilton, 9 Metc. 371.
Hunt *vs.* Carlisle, 1 Gray, 237.

Remarks of the Court are to be found in the case of the Carolus 2 Cur. C. C. 71, which seem to indicate that the owners of an inward bound vessel, having a pilot on board, are not liable in a case like the present; but those remarks were not necessary to the decision of the cause, and the weight of authority in this country is greatly the other way.

Smith *vs.* Creole, 2 Wall, Jr., C. C. 485.
Bussy *vs.* Donaldson, 4 Dall. 206.
Williamson *vs.* Price, 14 Mar. (t. a.) 399.
The Bark Lotty, Olcott's Adm. R. 329.
Yates *vs.* Brown, 8 Pick. 23.

Chancellor Kent says the pilot is considered as master *pro hac vice*, and if any loss or injury be sustained in the navigation of the

vessel while under his charge, he is answerable as strictly as if he were a common carrier, for his default, negligence, or unskillfulness; and the owner also is responsible to the party injured by the act of the pilot, as being the act of his agent.

3 Kent Com. 9th ed. 243.
See also Haggett *vs.* Montgomery, 5 Bos. and Pull. 446.
Att'y Gen'l *vs.* Case, 3 Price 302.
Abbott on Shipping, 5 Am. ed. p. 230, vol. 1.

Upon the whole case, I am of the opinion that the decision of the District Court was correct, and the decree there made is accordingly affirmed, with costs.

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SUPREME COURT OF THE UNITED STATES.

No. 263.

CHARLES N. MACKUBIN, AND ELLEN H. MACKUBIN, HIS WIFE, APPELLANTS,

v.

JOHN A. LOCKWOOD AND HENRY H. LOCKWOOD.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF MINNESOTA.

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District Court of the United States of America, for the District of Minnesota.

JOHN A. LOCKWOOD and HENRY H. LOCKWOOD *v.* CHARLES N. MACKUBIN, and ELLEN M. MACKUBIN, his wife.	Henry J. Horn, Plaintiffs' Solicitor. Henry L. Moss, Defs' Solicitor.

Feb. 8th, A.D. 1860. This day came the complainants, John A. Lockwood, and Henry H. Lockwood, by Henry J. Horn, their solicitor, and filed their bill of complaint, in the words and figures following, to wit:

In the District Court of the United States, for the District of Minnesota.

JOHN A. LOCKWOOD and HENRY H. LOCKWOOD *against* CHARLES N. MACKUBIN, and ELLEN N. MACKUBIN, his wife.	In Equity.

To the Honorable, the judge of the District Court of the United States, for the District of Minnesota, sitting in equity.

The above-named John A. Lockwood, of the United States Navy, and a citizen of the State of Delaware, and the above-named Henry H. Lockwood, of Annapolis, in the State of Maryland, and a citizen of the State of Maryland, bring this their bill against the above-named Charles N. Mackubin, and Ellen M. Mackubin, of Ramsey County, in the State of Minnesota, and citizens of the State of Minnesota:

"And thereupon your orators complain and say:

"That on the twenty-fifth day of September, A.D. 1858, at Saint Paul, in said Ramsey County, and State of Minnesota, the said Charles N. Mackubin made his promissory note in writing, bearing date the day and year last aforesaid, in the words and figures, following, to wit:

ST. PAUL, MINNESOTA, September 25, 1858.

$4287 71.

On or before the first day of November, 1859, I promise to pay to the order of John A. Lockwood, four thousand two hundred and eighty-seven $\frac{71}{100}$ dollars, for value received, with interest commencing from the first day of November, 1858, payable semi-annually, at the rate of twelve per cent. per annum, until paid; payable at the office of Wm. L. Banning & Co., Saint Paul, Minnesota.

CHARLES N. MACKUBIN.

And then and there for value received, delivered the said note to John A. Lockwood, one of the above-named complainants, and the payee therein named, and that the said John A. Lockwood is now the lawful owner and holder of the said note.

That heretofore, to wit, on the twenty-fifth day of September, 1858, at Saint Paul, in said Ramsey County, and State of Minnesota, the said Charles N. Mackubin made his certain other promissory note in writing, bearing date the day and year last aforesaid, in the words and figures following, to wit:

ST. PAUL, MINNESOTA, September 25, 1858.

$3654 21.

On or before the first day of November, 1859, I promise to pay to the order of Henry H. Lockwood, three thousand six hundred and fifty-four $\frac{21}{100}$ dollars for value received, with interest commencing from the first day of November, 1858, payable semi-annually, at the rate of twelve per cent. per annum, until paid; payable at the office of H. L. Banning & Co., Saint Paul, Minnesota.

CHARLES N. MACKUBIN.

And then and there for value received, delivered the said note last mentioned, to Henry H. Lockwood, one of the above-named complainants, and the payee therein named, and that the said Henry H. Lockwood is now the lawful owner and holder of said note last mentioned.

That to secure the payment of the said sums and interest, according to the conditions of said two promissory notes, the said Charles N. Mackubin, and the said Ellen M. Mackubin, then and now being the wife of the said Charles N. Mackubin, on the said twenty-fifth day of September, 1858, at Saint Paul, in said Ramsey County, and State of Minnesota, duly executed, under their hands and seals, acknowledged and delivered to the said John A. Lockwood, a certain mortgage, bearing date the day and year last aforesaid, whereby they granted, bargained, sold, and conveyed to the said John A. Lockwood, his heirs and assigns, forever, the following described real estate and premises, situate in the said county of Ramsey, and State of Minnesota, described as follows, to wit:

Lots numbered nine (9) and six (6), in block numbered fourteen (14), in Rice and Irvine's addition to Saint Paul, according to the plat thereof filed in the office of the register of deeds in said Ramsey county, and also lots numbered one (1), two (2), three (3), four (4), five (5), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28,) and twenty-nine (29), in block eighteen (18), and lots numbered thirteen (13), fourteen (14), and fifteen (15), in block nineteen (19), in Mackubin and Marshall's addition to Saint Paul, according to the recorded plot thereof filed in the office of the register of deeds of said Ramsey county, together with the frame dwelling-house erected on the three last-mentioned lots, and the improvements; provided, that if the said Charles N. Mackubin, his heirs, executors or administrators, should well and truly pay or cause to be paid to the said plaintiff, his heirs executors, administrators or assigns, the sums of money aforesaid, with interest aforesaid, at the time and in the manner before specified, according to the aforementioned conditions of the said promissory notes, then the said deed or mortgage to be null and void; otherwise to be and remain in full force and effect. But if default should be made in the payment of the said sum of money, or the interest, or of any part thereof, at the times before specified for the payment thereof, the said defendants in such case did thereby authorize and empower the said John A. Lockwood, his heirs, executors, administrators, and assigns, to sell the said granted premises at public auction, and convey the same to the purchaser in fee simple, agreeably to the statute in such case made and provided, and out of the moneys arising from such sale, to retain the principal and interest which should then be due on the said note, together with all costs and charges, and pay the surplus (if any) to the said defendants, their heirs, executors, administrators or assigns.

That the said mortgage was duly recorded in the office of the register of deeds of said Ramsey county, on the fifteenth day of October, 1858, at ten o'clock A. M., in Book O. of Mortgages, pages 49, 50. That the condition of the said mortgage has not been complied with, and that although the said notes were duly presented for payment on the day the same became due, and at the place where the same were made payable, and payment thereof duly demanded, yet the said notes have not been paid nor any part thereof, except the interest thereon, up to the fourth day of May, 1859, according to the tenor and effect of said notes.

That no proceedings have been had at law or otherwise for the recovery of the debt secured by said mortgage, and that no part of such debt has been collected or paid, save the interest up to the fourth day of May, 1859, aforesaid.

That the said mortgage is held by the said John A. Lockwood, in his name for the use and benefit of the said complainants.

To the end, therefore, that the said defendants may, if they can, show cause why your orators, the said complainants, should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct and perfect answers make to all and singular the premises aforesaid.

And that the usual decree may be made for the sale of the said mortgaged premises, and for the payment of the said sums due your orators aforesaid, amounting together to the sum of seven thousand nine hundred and forty-one $\frac{92}{100}$, principal, and also of the interest thereon from the said fourth day of May, 1859, according to law, and the tenor and effect of said notes accrued and to accrue upon the said notes and mortgage, and the costs and disbursements and expenses of this suit.

And that the said defendants, and all persons claiming or to claim under them subsequent to the commencement of this action, and all other persons who have any liens by judgment, or decree or otherwise, upon the said premises, subsequent to the said mortgage of your orators, or any liens or claims thereon by or under *by or under* such subsequent judgment or decree, either as purchaser, incumbrancer, or otherwise, may be barred and foreclosed of all equity of redemption or claim in the said mortgaged premises, and every part and parcel thereof.

And that the said defendant, Charles N. Mackubin, may be decreed and directed to pay to your orators any balance or deficiency which may remain unsatisfied of the principal or interest of said debt after the sale of said mortgaged premises, and that your orators may have such other or further relief in the premises as the nature of the case may require, and as may be agreeable to equity.

May it please your honor to grant unto your orators the writ of subpœna of the United States of America, issued out of and under the seal of this court, to be directed to the said defendants, Charles N. Mackubin and Ellen M. Mackubin, commanding the said defendants at a day certain and under a certain penalty therein to be specified, personally to be and appear before your honor in this court, and then and there answer to all and singular the premises, and to stand and abide such order and decree therein as to your honor shall seem meet.

And your orators shall ever pray, &c.

HENRY J. HORN,

ST. PAUL, Feb. 8, 1860. Solicitor and Counsel for Complainants.

Whereupon a subpœna issued in the words and figures following, to wit:

United States of America, District of Minnesota, *ss.*

[SEAL.] The President of the United States of America to Charles N. Mackubin and Ellen M. Mackubin, his wife, greeting:

You are hereby commanded that you personally appear before the judge of the District Court of the United States of America, for the District of Minnesota, in our Court of Chancery in and for the District aforesaid, on the first Monday of March next ensuing, at St. Paul, to answer to a bill of complaint exhibited against you in our said court, by John A. Lockwood and Henry H. Lockwood, and to do further, and receive what our said court shall have considered in that behalf, and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this District, who is hereby commanded to serve the same upon the said Charles N. and Ellen Mackubin, if to be found in his district, and due return thereof to make.

Witness the Honorable Rensselaer R. Nelson, Judge of the District Court of the United States of America for the District of Minnesota, at the city of St. Paul, in the said District, this eighth day of February, in the year of our Lord one thousand eight hundred and sixty, and of our independence the eighty-fourth.

GEORGE W. PRESCOTT,
Clerk.
HENRY J. HORN,
Solicitor.

And at the foot of said subpœna was the following memorandum indorsed, to wit: It is ordered by our said court that the said Charles N. Mackubin and Ellen M. Mackubin, the defendants aforesaid, do enter their appearance in this suit, in the clerk's office, on or before the day and time at which this subpœna is returnable, as aforesaid, otherwise the bill filed may be taken as confessed.

Attest, GEORGE W. PRESCOTT,
Clerk.

Which said subpœna was duly tested, signed, and sealed with the seal of our said court. And said process of subpœna was returned into said clerk's office by the marshal, indorsed as follows, to wit:

Served the within subpœna upon Charles N. Mackubin and wife, at St. Paul, in said District, by delivering an attested copy of the same to *to* Charles N. Mackubin, February 9th, 1860.

WM. B. GERE,
U. S. Marshal.

Fees, $4 52.

And afterwards, to wit, at rules, held in the clerk's office on the

first Monday in March, A.D. 1860, the following proceedings were had, to wit:

HENRY J. HORN,
Plaintiffs' Solicitor.
WM. HOLLINSHEAD,
Defendants' Solicitor.

JOHN A. LOCKWOOD and
HENRY H. LOCKWOOD
v.
CHARLES N. MACKUBIN and
ELLEN M. MACKUBIN, his wife.

And now come the defendants, Charles N. Mackubin and wife, by William Hollinshead, their solicitor, and on his motion it is ordered that their appearance be and it hereby is entered in this action.

And afterwards, to wit, on the second day of April, A.D. 1860, came the defendants, by William Hollinshead and H. L. Moss, their solicitors, and filed in said clerk's office their answer in writing, in the words and figures following, to wit:

In Chancery.

In the District Court of the United States for the District of Minnesota.

The joint and several answer of Charles N. Mackubin and Ellen M. Mackubin, defendants in the above cause, to the bill of complaint of John A. Lockwood and Henry H. Lockwood, complainants.

These defendants, now and at all times hereafter, saving and reserving unto themselves all and all manner of benefit and advantage of exceptions to the manifold errors and insufficiencies in the complainants' said bill of complaint contained, for answer thereto, or unto so much and such parts thereof as these defendants are advised is material for them to make answer unto, these defendants answer and say:

That they admit that on the twenty-fifth day of September, A.D. 1858, the said defendants, Charles N. Mackubin, made his promissory note in writing, bearing the same date thereof, whereby he promised to pay, on or before the first day of November, A.D. 1859, to the order of John A. Lockwood, the sum of four thousand two hundred and eighty-seven $\frac{71}{100}$ dollars, with interest, commencing from the first day of November, A.D. 1858, payable semi-annually, at the rate of twelve per cent. per annum, payable at the office of William L. Banning & Co., Saint Paul, Minnesota, and delivered the same to the said John A. Lockwood.

Further answering, these defendants admit, that on the said 25th day of September, A.D. 1858, the said defendant, Charles N. Mackubin, made his certain other promissory note in writing, bearing the

same date thereof, whereby he promised to pay, on or before the first day of November, A.D. 1859, to the order of Henry H. Lockwood, the sum of three thousand six hundred and fifty-four $\frac{21}{100}$ dollars, with interest, commencing from the first day of November, A.D. 1858, payable semi-annually, at the rate of twelve per cent. per annum, payable at the office of William L. Banning & Co., St. Paul, Minnesota, which said promissory note was then and there delivered to the said Henry H. Lockwood.

Further answering, these defendants admit, that to secure the payment of the said two promissory notes, they, the said defendants, made and executed under their hands and seals, a certain indenture of mortgage, as set forth in said bill of complaint, which was acknowledged, sealed, and delivered to the said complainants, and was thereafter duly recorded in the office of register of deeds, in and for the county of Ramsey, State of Minnesota.

Further answering, these defendants admit, that the said Charles N. Mackubin has neglected and omitted, and still neglects and omits to pay the said promissory notes or either of them, as alleged in said bill of complaint.

Further answering, these defendants allege and say, that they are residents and householders in the city of St. Paul, State of Minnesota; that the dwelling-house in which they reside with their minor children and occupy as a homestead, is situated upon lots number 13, 14, and 15, in block number 19, in Mackubin and Marshall's addition to St. Paul, according to the recorded plot thereof; that at the time of the execution of said mortgage and the delivery of the same to the said complainants, the said dwelling-house was in the course of erection, and was subsequently completed, since which these defendants have lived in and occupied said dwelling-house, situated upon said lots, as their homestead, and have ever since and do now occupy the same as such.

These defendants further answering allege and say, that they claim the said dwelling-house and the lots of land on which the same is situated, as their homestead, and all the rights and benefits thereto attached, by and under the provisions of the Act of the Legislature of the State of Minnesota, entitled An Act for a Homestead Exemption, passed August 12th, 1858.

Further answering, these defendants claim, that in executing the said mortgage and delivering the same to the said complainants, they did not alienate or convey their right to retain and occupy the said dwelling-house and the said lots as their homestead.

Further answering, these defendants say, that the said promissory notes, to secure the payment of which said mortgage was executed, were not given in consideration of the purchase of said lots or either of them, or any part thereof; that at the time of the execution of said mortgage, these defendants had no other domicil, or residence, or dwelling-house, occupied by them or intended to be occupied by

them, or either of them, than the said dwelling-house, upon said lots of ground, all of which the said complainants knew at the time of the execution and delivery of said mortgage.

Wherefore these defendants ask that the said lots of ground, to wit, lots 13, 14, and 15, in block 19, of Mackubin and Marshall's addition to St. Paul, upon which the said dwelling-house of these defendants is situated, and which they occupy and claim as a homestead, be exempt from the decree of foreclosure and sale, as asked for by said complainants in their said bill of complaint.

WM. HOLLINSHEAD & H. L. MOSS,
Solicitors for Defendants.

District of Minnesota, *ss.*

On this the 2d day of April, A. D. 1860, personally came Charles N. Mackubin, who being first duly sworn, says, that he has read the foregoing answer, and that the contents thereof is true of his own knowledge, except those matters therein contained, stated upon information or belief, and as to those matters he believes it to be true.

CHARLES N. MACKUBIN.

Sworn and subscribed to before me, April 2d, 1860.

R. R. NELSON,
U. S. District Judge.

And afterwards, to wit, at the stated June term of said court, begun and held at Preston, in and for said district, on the first Monday, to wit, the fourth day of June, in the year of our Lord one thousand eight hundred and sixty, on the second day of said term, being the fifth day of said June, the following among other proceedings were had, to wit:

JOHN A. LOCKWOOD and HENRY H. LOCKWOOD
v.
CHARLES N. MACKUBIN and ELLEN M. MACKUBIN, his wife. } In Chancery.

Argued and submitted 2d day of term.

"This cause having been regularly set down for hearing at this term of court, came on to be heard this day upon the bill of complaint and defendant's answer thereto on file in this cause; and the same is thereupon argued by the respective counsel for the complainants and defendants, and is submitted to the court, and the court takes the same under advisement."

And afterwards, to wit, at a stated term of said court, held at St. Paul, in and for said district, on the fourth day of October, in the year of our Lord one thousand eight hundred and sixty, among other things the following proceedings were had:

4th day of Term.

JOHN A. LOCKWOOD and HENRY H. LOCKWOOD
v.
CHARLES N. MACKUBIN and ELLEN M. MACKUBIN, his wife. } In Chancery.

This cause having been duly argued, and submitted upon the bill and answer herein, at the last preceding stated term of this court, and by the court held under advisement; and the court having duly considered the several matters in said bill and answer set forth, it is now by the said court here ordered and adjudged, that the plaintiffs' said bill of complaint be taken as confessed against said defendants, and that the prayer of said bill be granted, notwithstanding anything in said answer of said defendants contained. And on motion of Henry J. Horn, the plaintiffs' said solicitor, and of counsel, it is further ordered, that this cause be and it is hereby referred to the clerk of this court, a master in chancery herein, to hear and take the proofs, and report to this court the amount due the plaintiffs for principal and interest upon the mortgage in the bill of complaint herein described.

And afterwards, to wit, on the same day last mentioned, in the term last aforesaid, the following further proceedings were had in this cause by said court, to wit:

4th day of Term.

JOHN A. LOCKWOOD and HENRY H. LOCKWOOD
v.
CHARLES N. MACKUBIN and ELLEN M. MACKUBIN, his wife. } In Chancery.

"This day this cause came on to be further heard at this term, upon the bill and answer and report of the master herein, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed by the court, as follows, to wit: that the report of George W. Prescott, a master of this court, wherein the sum of eight thousand nine hundred and twenty-eight dollars and four cents appears to be due to the said plaintiffs, at the date of said report, on the notes and mortgage in said bill mentioned, for principal and interest, be and is hereby confirmed.

"It is therefore, on motion of Henry J. Horn, solicitor and of counsel for said plaintiff, further ordered, adjudged and decreed, and this court doth hereby order, adjudge and decree, that all and singular the mortgaged premises mentioned in the bill of complaint in this cause, and hereinafter described, or so much thereof as may be sufficient to raise the amount due the plaintiffs for principal, interest and costs in this cause, and which may be sold separately without material injury to the parties interested, be sold at public auction, under the direction of George W. Prescott, a master of chancery in this court,

unless said mortgagors, previous to such sale, shall pay to said plaintiffs the said sum of eight thousand nine hundred and twenty-eight dollars and four cents, and interest thereon from this date, together with their costs in this cause to be taxed.

And it is further ordered that said sale be made according to the rules and practice of this court; that said master give public notice of the time and place of such sale, by advertisement, published in some newspaper printed in the city of St. Paul, in said district, at least once in each week for six successive weeks previous to such sale; that the plaintiffs, or any of the parties to this cause, may become the purchaser of said premises; that said master execute a deed or deeds to the said purchaser or purchasers of the morgaged premises after the expiration of one year from the day of said sale, unless the same shall have been previously redeemed, pursuant to law and the rules of this court; and that said master pay to said plaintiffs, or their solicitor, out of the proceeds of such sale, their costs in this cause to be taxed, and also the aforesaid sum of eight thousand nine hundred and twenty-eight dollars and four cents, and interest thereon from this date to the day of such sale, or so much thereof as the purchase-money of the mortgaged premises will pay; and that said master take a receipt for the amount so paid, and file the same with his report of sale; and that he bring the surplus moneys, if any there be, into court without delay, to abide the further order of the court. And it is further ordered, adjudged and decreed, that the defendants and all persons claiming or to claim from or under them or either of them, be forever barred and foreclosed of and from all equity of redemption, and claim of, in, and to said mortgaged premises, and every part and parcel thereof, unless said mortgagors shall redeem the same as aforesaid.

And it is further ordered and decreed, that the purchaser or purchasers of said mortgaged premises at such sale, be let into the possession thereof, and that any of the parties to this cause who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this suit, has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers, on production of the deed of said master, for such premises, and a certified copy of the order confirming the report of sale in this cause.

And it is further ordered, that in case the said mortgagors, or any person lawfully claiming through or under them, shall not, within eight days after said sale, pay or cause to be paid to the said purchaser or purchasers at such sale, the interest upon the amount of said sale or purchase for one year, at the rate of twelve per cent. per annum, then the said purchaser or purchasers shall be entitled to the immediate possession of said premises, and of the use, rents, and profits thereof.

And it is further ordered and decreed, that if the moneys arising

from such sale are insufficient to pay the amount due to the plaintiff as aforesaid, with interest and costs, that said master specify the amount of such deficiency in his report of the sale; and that, on the coming in and confirmation of said report, the defendant, Charles Mackubin, who is personally liable for the payment of the debts secured by said mortgage, pay to the plaintiff the amount of such deficiency, with interest thereon from the date of such report, and that the plaintiff may have execution therefor.

The description of property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to, or from the bill of complaint in this cause, is as follows: Situate in the county of Ramsey, and State of Minnesota, and being lots numbered nine (9) and six (6), in block numbered fourteen, in Rice & Irvine's addition to Saint Paul, according to the plat thereof filed in the office of the register of deeds in said Ramsey county, and also lots numbered one (1), two (2), three (3), four (4), five (5), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28), and twenty-nine (29), in block eighteen, and lots numbered thirteen (13), fourteen (14), and fifteen (15), in block nineteen (19), in Mackubin and Marshall's addition to Saint Paul, according to the recorded plat thereof filed in the office of the register of deeds of said Ramsey county, together with the frame dwelling-house erected on the three last-mentioned lots and the improvements."

And afterwards, to wit, on the twenty-seventh day of October, in the year of our Lord one thousand eight hundred and sixty, the said plaintiff's costs in this cause were duly taxed at the sum of forty dollars and thirty-two cents, against said defendants.

A true record.

Attest,

GEORGE W. PRESCOTT,
Clerk.

District of Minnesota, *ss.*

I, George W. Prescott, Clerk of the District Court of the United States for the District of Minnesota aforesaid, do hereby certify that I have carefully compared the foregoing with the original record of proceedings and files in my office, in the cause therein entitled, and that the same is a full and complete transcript of the same, as they appear of record.

In testimony whereof, I have hereunto set my hand, and af-
[SEAL.] fixed the seal of said court, at St. Paul aforesaid, this twenty-fourth day of November, A.D. 1860.

GEORGE W. PRESCOTT,
Clerk.

Copy of Mortgage.

"This indenture, made this twenty-fifth day of September, in the year of our Lord one thousand eight hundred and fifty-eight, between Charles N. Mackubin and Ellen M. Mackubin, his wife, of Ramsey County, Minnesota, parties of the first part, and John A. Lockwood, of the United States Navy, party of the second part, witnesseth, that the said parties of the first part, in consideration of the sum of seven thousand nine hundred and forty-one $\frac{92}{100}$ dollars, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, and convey to the said party of the second part, his heirs and assigns, forever, all those tracts or parcels of land lying and being in Ramsay county, in the State of Minnesota, described as follows, to wit, lots numbered nine (9) and six (6), in Rice & Irvine's addition to Saint Paul, according to the plot thereof, filed in the office of the register of deeds in said Ramsey county; and also lots numbered one (1), two (2), three (3), four (4), five (5), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28), and twenty-nine (29), in block eighteen (18); and lots numbered thirteen (13), fourteen (14), and fifteen (15), in block nineteen (19), in Mackubin & Marshall's addition to Saint Paul, according to the recorded plot thereof, filed in the office of the register of deeds of said Ramsey county; together with the frame dwelling-house erected on the three last-mentioned lots, and the improvements. To have and to hold the same, together with all the hereditaments and appurtenances thereunto in any wise appertaining. And the said Charles N. Mackubin, one of the parties of the first part, doth covenant with the said party of the second part, his heirs and assigns, as follows: First, that he is lawfully seized of said premises; second, that he hath good right to convey the same; third, that the same are free from all incumbrances; and fourth, that the said party of the second part, his heirs and assigns, shall quietly enjoy and possess the same; and that he will warrant and defend the title to the same against all lawful claims.

"Provided, nevertheless, that if the said Charles N. Mackubin, of the first part, his heirs, executors, or administrators, shall well and truly pay or cause to be paid to the said party of the second part, his heirs, executors, administrators, or assigns, the sum of seven thousand nine hundred and forty-one $\frac{92}{100}$ dollars, on or before the first day of November, 1859, with interest, commencing from the first day of November, 1858, payable semi-annually, at the rate of twelve per cent. per annum until paid (being the amount of his two several promissory notes of this date, one in favor of Henry H. Lockwood for $\$3654\frac{21}{100}$, and one in favor John A. Lockwood for

$4287\frac{71}{100}$, according to the conditions of his said two several promissory notes, bearing even date herewith, then this deed to be null and void; otherwise to be and remain in full force and effect. But if default shall be made in the payment of the said sum of money, or the interest, or of any part thereof, at the time hereinbefore specified for the payment thereof, the said parties of the first part in such case do hereby authorize and fully empower the said party of the second part, his executors, administrators, and assigns, to sell the said hereby granted premises at public auction, and convey the same to the purchasers in fee simple, agreeably to the statute in such case made and provided, and out of the moneys arising from such sale to retain the principal and interest which shall then be due on the said notes, or either of them, together with all costs and charges, and pay the overplus (if any) to the said parties of the first part, their heirs, executors, administrators, or assigns.

"In testimony whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

"CHARLES N. MACKUBIN. [SEAL.]
"ELLEN M. MACKUBIN. [SEAL.]

"Signed, sealed, and delivered
in presence of
"SAMUEL G. SLOAN,
"H. N. ARNOLD."

"Territory of Minnesota, County of Ramsey, *ss.*

"Be it known, that on this twenty-fifth day of September, A.D. 1858, personally came before me, Charles N. Mackubin and Ellen M. Mackubin, his wife, the signer and sealer of the foregoing deed, to me well known, and acknowledged the same to be their own free act and deed. And the said Ellen M. Mackubin, on a private examination by me, separate and apart from said husband, acknowledged that she executed said deed freely and voluntarily, without any fear or compulsion from any one.

[OFFICIAL SEAL.] "SAMUEL G. SLOAN,
"Notary Public, Minnesota."

(For indorsement on foregoing mortgage, see certificate of clerk below.)

(*Copy of Notes.*)

"ST. PAUL, MINNESOTA, September 25, 1858.

"$3654\frac{21}{100}$.

"On or before the first day of November, 1859, I promise to pay to the order of Henry H. Lockwood, three thousand six hundred and fifty-four $\frac{21}{100}$ dollars, for value received, with interest commencing from the first day of November, 1858, payable semi-annually at the

rate of twelve per cent. per annum until paid, payable at the office of W. L. Banning & Co., Saint Paul, Minnesota.

"CHARLES N. MACKUBIN."

(The foregoing indorsed as follows:)

"May 4, 1859, received two hundred and nineteen $\frac{34}{100}$ dollars, interest to this date on within note."

(*Second Note.*)

"SAINT PAUL, MINNESOTA, September 25th, 1858.

"$4287\frac{71}{100}$.

"On or before the first day of November, 1859, I promise to pay to the order of John A. Lockwood, four thousand two hundred and eighty-seven $\frac{71}{100}$ dollars, for value received, with interest commencing from the first day of November, 1858, payable semi-annually at the rate of twelve per cent. per annum until paid, payable at the office of Wm. L. Banning & Co., Saint Paul, Minnesota.

"CHARLES N. MACKUBIN."

(The foregoing indorsed as follows:)

"Received on the within note, interest to May 4, '59, two hundred and fifty-seven $\frac{22}{100}$ dollars."

District of Minnesota, *ss.*

I, George W. Prescott, clerk of the District Court of the United States for the District of Minnesota, do hereby certify, that I have compared the foregoing with the original mortgage and notes, filed in my office as exhibits and evidence in a certain cause in chancery, in said court, wherein a decree of foreclosure was rendered, at the last October term of said court, between John A. Lockwood and Henry H. Lockwood, plaintiffs, and Charles N. Mackubin and wife, are defendants, and that the same are true and full copies of said originals and of the indorsements on said notes. And I further certify, that said original mortgage, of which the foregoing is a copy, is indorsed as follows:

"OFFICE OF REGISTER OF DEEDS,
COUNTY OF RAMSEY, MIN.

"I hereby certify, that the within bond was filed in this office, for record, on the 15th day of October, A.D. 1858, at 10 o'clock A.M., and was duly recorded in Book O. of Mortg's, pages 49, 50. Edward Heenan, recorder of deeds."

In testimoney whereof, I have hereto set my hand and affixed the seal of said court, at St. Paul, in said district, this 30th day of November, A.D. 1860.

[SEAL.]

GEORGE W. PRESCOTT,
Clerk.

United States Supreme Court.

Appeal from U. S. District Court for the District of Minnesota.

JOHN A. LOCKWOOD and HENRY H. LOCKWOOD
v.
CHARLES N. MACKUBIN and ELLEN M. MACKUBIN.

Take notice, that the above-named defendants have appealed from the decision of the District Court of the United States, for the District of Minnesota, to the United States Supreme Court, in the above cause.

Dated Oct. 15th, 1860.

C. D. MOSS,
Sol. for Appellants.

To M. J. HORN, Esq.,
Sol. for Complainants.

The above indorsed: "Service of a copy accepted, Oct. 15th, 1860. H. J. Horn, solr. for John A. and Henry H. Lockwood."

"Filed Oct. 15, 1860.

GEO. W. PRESCOTT,
Clerk.

Copy of Bond on Appeal.

Supreme Court of the United States, *ss.*

"Know all men by these presents, that we, Charles N. Mackubin and Ellen M. Mackubin, principals, and Thomas Daly, John B. Sanborn, and Chas. C. Lund, as sureties, all of the County of Ramsey, State of Minnesota, are held and firmly bound unto John A. Lockwood and Henry H. Lockwood, in the sum of three thousand dollars, to be paid to the said John A. Lockwood and Henry H. Lockwood, their executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this thirteenth day of October, A.D. 1860.

Whereas, the above-named Charles N. Mackubin and Ellen M. Mackubin, have appealed to the Supreme Court of the United States to reverse a final decree, rendered by the District Court of the United States for the District of Minnesota, in an action therein pending, wherein the said John A. Lockwood and Henry H. Lockwood are complainants, and the said Charles N. Mackubin and Ellen M. Mackubin are defendants. Now, therefore, the condition of this obligation is such, that if the above-named Charles N. Mackubin, and

Ellen M. Mackubin, shall prosecute his said appeal to effect, and answer all damages and costs if said appeal is dismissed, or said decree is not reversed, and abide the order of the court therein, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

CHARLES N. MACKUBIN. [SEAL.]
ELLEN MACKUBIN. [SEAL.]
JOHN B. SANBORN. [SEAL.]
THOMAS DALY. [SEAL.]
CHAS. C. LUND. [SEAL.]

Sealed and delivered
in presence of
H. L. Moss.

United States of America, District of Minnesota, *ss.*

John B. Sanborn, Thomas Daly, and Chas. C. Lund, being first duly sworn, each for himself, says, that he is worth the sum of fifteen hundred dollars, over and above all debts and liabilities, and property exempt from execution.

THOS. DALY,
JOHN B. SANBORN,
CHAS. C. LUND.

Sworn and subscribed to before me, this the 13th day of October, A.D. 1860.

GEO. W. PRESCOTT,
U. S. Dist. Clerk.

I hereby approve of the sureties in the foregoing bond, and allow a supersedeas to issue in the said cause.

In open court, this 15th day of October, A.D. 1860.

R. R. NELSON,
U. S. Dist. Judge.

United States of America, *ss.*

The President of the United States of America, to the District Court of the United States for the District of Minnesota:

Because in the record and proceedings, as also in the finding of a decree, which is in the said District Court, before you, between John A. Lockwood and Henry H. Lockwood, complainants, and Charles N. Mackubin and others are respondents, a manifest error hath happened, to the great damage of the said respondents, as they allege, and it being fit that the record and proceedings therein should be reviewed, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby ordered and directed, if final decree be

therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein what of right, and according to the law and custom of the United States, should be done.

Witness the Honorable R. B. Taney, Chief Justice of the said Supreme Court of the United States, this fifteenth day of October, A.D. 1860.

R. R. NELSON,
U. S. Dist. Judge for Minnesota.

The foregoing indorsed: "Order on Appeal. Filed Oct. 15, 1860. Geo. W. Prescott, clerk."

United States of America, *ss.*

To John A. Lockwood and Henry H. Lockwood, greeting:

You, and each of you, are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, to answer in the matter of appeal from the final decree, made by the District Court of the United States for the District of Minnesota, in an action wherein Charles N. Mackubin and Ellen M. Mackubin are appellants, and you are respondents, to show cause, if any there be, why the decree therein appealed from should not be corrected, and speedy justice should not be done to the parties in this behalf.

And whereas the said Charles N. Mackubin and Ellen M. Mackubin have given sufficient security to answer all damages and costs that may be awarded if said appeal is dismissed, or said decree should not be reversed, you are hereby commanded and directed to refrain and desist from all further proceedings upon or under said decree, and in said action, until further orders herein.

Witness the Honorable R. B. Taney, Chief Justice of the said Supreme Court of the United States, this the fifteenth day of October, A.D. 1860.

R. R. NELSON,
Judge of the District Court of the United States
for the District of Minnesota.

Indorsed: United States Supreme Court. Charles N. Mackubin and Ellen M. Mackubin, appellants, *v.* John A. Lockwood and Henry H. Lockwood. Citation. Service of a copy accepted this 15th day of October, 1860. Henry J. Horn, att'y of J. A. and Henry H. Lockwood. Filed Oct. 15, 1860. H. L. Moss, sol'r for appellants.

Deposited in clerk's office U. S. District Court, District Minnesota, this 15th Oct., 1860. George W. Prescott, clerk.

District of Minnesota, *ss.*

I, George W. Prescott, clerk of the District Court of the United States for said District of Minnesota, do hereby certify that the foregoing are true copies of the "Notice of Appeal," "Bond on Appeal," and "Order on Appeal," on file in my said office, and filed therein on said 15th day of October, A.D. 1860.

In testimony whereof, I have hereto set my hand and [SEAL.] affixed the seal of said court, this 24th day of November, A.D. 1860.

GEO. W. PRESCOTT,
Clerk.

Indorsed: Supreme Court of the United States. Jno. A. Lockwood and Henry H. Lockwood, respondents, *v.* Charles N. Mackubin and wife, appellants. Return on appeal from U. S. District Court, District of Minnesota. H. L. Moss, att'y for appellants.

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